

1 IN THE UNITED STATES BANKRUPTCY COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 IN RE: § CASE NO. 23-090020-11
 5 SERTA SIMMONS BEDDING, LLC, § JOINTLY ADMINISTERED
 ET AL, § HOUSTON, TEXAS
 6 § WEDNESDAY,
 § MAY 17, 2023
 DEBTORS. § 2:02 P.M. TO 5:52 P.M.
 7 *****
 SERTA SIMMONS BEDDING, LLC, § CASE NO. 23-09001-ADV
 8 ET AL § JOINTLY ADMINISTERED
 § HOUSTON, TEXAS
 9 VERSUS § WEDNESDAY,
 § MAY 17, 2023
 10 AG CENTRE STREET PARTNERSHIP, §
 ET AL § 2:02 P.M. TO 5:52 P.M.

11
 12 **CONFIRMATION DAY THREE -- AFTERNOON SESSION (VIA ZOOM)**

13 BEFORE THE HONORABLE DAVID R. JONES
 14 UNITED STATES BANKRUPTCY JUDGE

15 APPEARANCES: SEE NEXT PAGE

16 COURTROOM DEPUTY: VRIANA PORTILLO

17
 18 **(Recorded via CourtSpeak)**

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1 **HOUSTON, TEXAS; WEDNESDAY, MAY 17, 2023; 2:02 P.M.**

2 THE COURT: All right. We are back on the Record
3 in the jointly administered cases under Case No. 23-90020,
4 as well as the Adversary.

5 Mr. Schrock, good to see you. Hadn't seen you
6 since Day One.

7 MR. SCHROCK: It's good to see you as well, Your
8 Honor. Ray Schrock for the Record, Weil Gotshal & Manges,
9 counsel for the Debtors.

10 Your Honor, I told you I think at the conclusion
11 of Monday's hearing that we're going to try and work on a
12 resolution the disqualification count.

13 THE COURT: Oh, yes.

14 MR. SCHROCK: And I'm pleased to report that we
15 have reached a resolution subject to enter of a stipulation
16 and agreed order by this Court. And I have a highly
17 negotiated statement, which I've been authorized to read to
18 the Court regarding that resolution.

19 THE COURT: Okay.

20 MR. SCHROCK: Although the Debtors and Apollo each
21 feel very strongly and in good faith about the
22 disqualification and validity respectively of Apollo's
23 claims, to save the time and cost and expense of the
24 parties, as well as the Court's time associated with this
25 matter, the parties reached a view that reaching a

1 commercial and consensual resolution of this dispute was in
2 both parties' best interests.

3 The Debtors and Apollo have agreed that 50 percent
4 of Apollo's approximately \$181 million claim, as noted on
5 the 2019 statement filed with the Court, will be allowed to
6 clear and 50 percent will not be allowed to clear.

7 We finalized a stipulation and agreed order that,
8 as I mentioned, that's subject to the Court's approval,
9 would resolve the matter and we'll be filing it with the
10 Court this afternoon.

11 THE COURT: All right. So I just want to make
12 sure I understand, and I'm not in any way trying to change
13 the deal, I just want to understand the deal.

14 MR. SCHROCK: Yes.

15 THE COURT: So of the \$181 million that were
16 purchased, half is going to be allowed to go through, the
17 other half is not?

18 MR. SCHROCK: Correct.

19 THE COURT: And then with respect to the DQ List
20 going forward?

21 MR. SCHROCK: They're still on the DQ List.

22 THE COURT: It's an agreement that they're on the
23 DQ List.

24 MR. SCHROCK: Correct.

25 THE COURT: And then the claim that's filed in the

1 Adversary is being withdrawn with prejudice?

2 MR. SCHROCK: Yes, Your Honor.

3 THE COURT: All right. Can we get confirmation
4 that that is the deal?

5 Mr. Hermann?

6 MR. HERMANN: Good afternoon, Your Honor. For the
7 Record, Brian Hermann from Paul Weiss on behalf of Apollo.

8 That is correct.

9 THE COURT: All right. Thank you.

10 MR. HERMANN: Thank you.

11 THE COURT: When you all have gotten the document
12 signed off by everyone, just let Mr. Alonzo know and I'll
13 promptly turn that around.

14 And just for the Record, that relieves the
15 obligation of the gentleman whose name I have forgotten --

16 MR. SCHROCK: Mr. Prince.

17 THE COURT: -- to appear.

18 MR. SCHROCK: Okay.

19 THE COURT: All right.

20 MR. SCHROCK: Thanks, Your Honor.

21 THE COURT: Thank you.

22 Maybe I should just send you back out with Mr.
23 Hermann and you guys can work on the rest of it.

24 (Laughter.)

25 MR. HERMANN: Well, we may go to dinner, Your

1 Honor, tonight.

2 THE COURT: Okay.

3 MR. HERMANN: So you never know.

4 THE COURT: Who's paying? That will give me
5 something --

6 (Laughter)

7 MR. HERMANN: We haven't worked that out yet.

8 THE COURT: Okay. Fair enough. Small steps.

9 All right. Thank you for the announcement.

10 All right. And Mr. Sveen is ready? Are we ready
11 for Cross?

12 Let me ask, are you going to need control?

13 MS. BEAUMONT: Yes, for Mr. Carlock, yes.

14 THE COURT: All right.

15 UNIDENTIFIED SPEAKER: Want me to turn it on?

16 THE COURT: That would be so much better. Thank
17 you. That's just so much easier.

18 (Pause in the proceedings.)

19 THE COURT: All right. You have control. Thank
20 you.

21 MS. BEAUMONT: Thank you, Judge. I am Anne
22 Beaumont from Friedman Kaplan Seiler Adelman & Robbins for
23 the Excluded Lenders.

24 CROSS-EXAMINATION

25 BY MS. BEAUMONT:

1 Q Good afternoon, Mr. Sveen, nice to see you again.

2 A Good afternoon.

3 Q I believe we sent you a sealed envelope. Did you
4 receive that?

5 A Yes, I have it right here.

6 Q Okay. If you'd like to go ahead and open that up,
7 that'd be great.

8 A (Opens envelope.) All set.

9 Q That's all -- that's great. Thank you very much. You
10 won't need that right away but in a moment I'll have you
11 turn to it.

12 A Okay. Thank you.

13 Q All right. So at some point in 2016 Eaton Vance bought
14 Serta's 1-L term loans as an allocation in the initial deal.
15 Right?

16 A Yes.

17 Q And Eaton Vance also bought and sold Serta's first lien
18 term loans in the secondary market.

19 A Yes, that's correct.

20 Q When Eaton Vance transacted in Serta's first lien term
21 loans in the secondary market they used standard LSTA
22 documentation for those trades. Correct?

23 A That's correct, yes.

24 Q At the time the 2016 credit agreement was entered into,
25 you were not aware of any transaction that had previously

1 been done that included the components of what eventually
2 was the June 2020 Serta transaction. Correct?

3 A Using those exact components together in the mechanism
4 that was used, that's correct.

5 Q Now I'd like to show you a document that is in your
6 binder and it was -- it's Defendant's Exhibit 167, it should
7 be the third tab in your binder. It's ECF Number 250-73,
8 and that's already in evidence.

9 THE COURT: Agreed.

10 BY MS. BEAUMONT:

11 Q And if you'll turn to the third page of the exhibit,
12 this is a letter from Gibson Dunn to UBS from June 4, 2020.
13 Correct?

14 A Yes.

15 Q And Eaton Vance was aware that this letter was being
16 sent?

17 A Yes, we were.

18 Q The cover email that's on the prior page indicates that
19 the letter was sent at about 7:30 in the evening of June 4,
20 2020. Correct?

21 A Yes, it does.

22 Q Please turn to, it's page 2 of the letter, it's page 4
23 of the exhibit.

24 A Okay. Thank you.

25 Q And then in the third paragraph on that page, the

1 second sentence from the end, it states -- there's some
2 reference to some prohibited transactions that have been
3 called to the attention of UBS.

4 Do you see that?

5 A In the face of such potential prohibited transactions,
6 yes.

7 Q That's right. And it says, "The secured lender group
8 is prepared to take the necessary steps to exercise its
9 rights to prevent such a transaction."

10 Do you see that?

11 A Yes.

12 Q Now that's a threat of litigation, isn't it?

13 A I don't read it as such, no.

14 Q No, but that letter was sent the day after you had
15 emailed, as we saw this morning, with Mr. Daniello
16 (phonetic) about having a good shot at avoiding litigation.
17 Correct?

18 A I'm not sure if that's in the same context as this.

19 Q Okay.

20 A I'll have to look at that.

21 Q Now please look at the -- let's see, the last paragraph
22 on the same page, page 2 of the letter. The second sentence
23 reads, "With a highly levered capital structure, extensive
24 debt service obligations in the face of limited liquidity,
25 significant general cash burn, a stated need for new capital

1 and a severe decline in revenue with no clear foreseeable
2 recovery to normalized operations, we believe it is highly
3 likely that the company may very well already be insolvent."

4 Do you see that?

5 A I do.

6 Q And at the time this letter was sent Eaton Vance did
7 not believe that Serta was insolvent. Correct?

8 A I stated previously to you that I didn't believe the
9 company was insolvent.

10 Q And you don't recall any discussion among the secured
11 lender group about Serta's insolvency. Correct?

12 A I wasn't in the day-to-day discussions with the other
13 lenders nor with counsel. I was one step removed from those
14 discussions --

15 Q But you were the --

16 A -- which I'm fine on that.

17 Q -- you were the 30(b)(6) designee for Eaton Vance when
18 I deposed you on May 5th. Correct?

19 A That's correct.

20 Q And when I asked you, "At the time" -- on page 178 of
21 your deposition I asked you, "At the time the June 4th
22 letter was sent, Gibson Dunn was representing Eaton Vance in
23 some capacity. Correct?"

24 And you answered, "Yes."

25 And then I asked, "And they were not authorized to make

1 the statement that they made to the effect that" --

2 And you answered, "They're making the statement on
3 behalf of the group of the lenders and they had potentially
4 done their own evaluations and I can't -- I just can't
5 recall exactly any discussion around insolvency. So I can't
6 recall comment, I don't recall discussion around that."

7 Is that correct?

8 A That is correct, that's special.

9 MS. AYCOCK: Objection, Your Honor, improper
10 impeachment.

11 THE COURT: Yeah, I didn't quite understand that
12 either.

13 Help me understand what you are trying to impeach.

14 MS. BEAUMONT: Well, Mr. Sveen is saying today
15 that he can't say anything about that and he was able to
16 talk about that at his deposition just --

17 THE COURT: Actually, I mean what you read me
18 sounded pretty consistent.

19 MS. BEAUMONT: I'll move on, Your Honor.

20 THE COURT: Okay.

21 BY MS. BEAUMONT:

22 Q And you don't recall Centerview doing an analysis of
23 Serta's solvency. Correct?

24 A That's correct, not to my knowledge.

25 Q Now within -- sorry, the day after sending the letter

1 to UBS, the secured lender group did agree in principle on a
2 transaction with Serta. Correct?

3 A On June 5, yes, that's correct.

4 Q That transaction was announced on June 8, 2020?

5 A Yes, I believe the company made that announcement on
6 June 8, that's correct.

7 Q And all of the members of the secured lender group
8 represented by Gibson Dunn participated in that transaction.
9 Correct?

10 A I'm sorry, can you repeat the question?

11 Q Sure. All the members of the secured lender group
12 participated in the transaction announced on June 8, 2020.

13 A All of the members? Well, the members of the Ad Hoc
14 Committee participated in the transaction. I'm sorry, you
15 mentioned all of -- all the lenders.

16 Q Sorry, did all the members of the -- I'm using the
17 defined term, "Secured Lender Group," as it was used in the
18 letter to Gibson Dunn. So that's, yes, that's the Ad Hoc
19 group that you referred to?

20 A Okay. Yes, for the -- yes, I understand.

21 Q Let me ask the question again.

22 A So let's see -- yeah.

23 Q All the members of the Ad Hoc group, to use your
24 terminology, participated in the transaction that was
25 announced on June 8, 2020. Correct?

1 A That is my knowledge, yes.

2 Q After the announcement various lenders that had not
3 previously been part of that group contacted Eaton Vance.
4 Correct?

5 A That's true, yes.

6 Q They asked to be allowed to participate in the
7 transaction?

8 A Some asked us that, but we didn't have the authority to
9 grant that so we passed them to the borrower -- to Advent.

10 Q The decision of who ultimately got to participate
11 beyond the original Ad Hoc Group that was up to Advent and
12 the company?

13 A Yes, that's my understanding, it had responsibility for
14 that solely with Advent, the company.

15 Q Okay. Switching gears to a different topic, this
16 morning Ms. Aycock asked you some questions about the
17 indemnity in the 2020 credit agreement.

18 Do you remember that?

19 A Yes.

20 Q Now Eaton Vance was not involved in the negotiation of
21 the indemnity language in the 2020 credit agreement.
22 Correct?

23 A Well, when you say Eaton Vance, our -- Gibson Dunn was
24 negotiating on our behalf, well, Eaton Vance. No, they
25 would not have been directly negotiating the terms of that

1 indemnity agreement, no.

2 Q And that indemnity was not something that Eaton Vance
3 had requested. Correct?

4 A We expected indemnity, well, we expected an appropriate
5 indemnity clause and we relied upon our counsel to ascertain
6 the needs of that indemnity clause and execute it. And so
7 that's -- yeah.

8 Q Now when you testified at your deposition as the
9 Rule 30(b)(6) designee for Eaton Vance, as part of your
10 preparation you spoke with Mr. Daniello. Correct?

11 A That's correct.

12 Q And you spoke specifically with Mr. Daniello about this
13 indemnity?

14 A We spoke about -- yes, indemnity, we did speak about it
15 on broad terms, yes.

16 Q And Mr. Daniello did not know who -- that that had been
17 a negotiated point. Correct?

18 A He said it wasn't a hotly contested point, so, yes,
19 that point was negotiated. He said that it was not a hotly
20 negotiated point, but rather the point was accepted by the
21 other side without objection, or at least the negotiation
22 got to a point where it was acceptable to our counsel and it
23 wasn't something that had to rise to something that needed
24 to be debated or discussed with us at any material length.

25 Q Now I'm just going to show you --

1 MS. BEAUMONT: Can you pull up Mr. Sveen's
2 deposition, page 202, please, S-V-E-E-N.

3 MR. CARLOCK: What page?

4 MS. BEAUMONT: 202.

5 BY MS. BEAUMONT:

6 Q And do you see that on the screen there, Mr. Sveen?

7 A I do.

8 Q Okay. And starting at Line 12 I asked you, "And do you
9 have any understanding as to whether the indemnity described
10 in Section 903(b) of Exhibit 18, the 2020 agreement, would
11 require Serta to indemnify Eaton Vance for any damages
12 awarded it might have to pay in this case?"

13 And there was an objection and you answered, "I don't
14 know, I wasn't party to that negotiation of these
15 provisions."

16 And then I asked you, "Is there anybody at Eaton Vance
17 would know?"

18 And you responded, "In -- I did discuss with Patrick
19 Daniello who was -- would have been closest to the
20 discussion of indemnity provisions in some of the different
21 documents that we're reviewing today. And the initial one,
22 his understanding is that indemnities weren't -- he was --
23 that the indemnities -- that it was not a -- something that
24 he was involved in discussing or debating or approving and
25 that they were rather standard indemnities as far as he

1 understood and that just that were in the provisions. And
2 he didn't know that that was a negotiated point that brought
3 -- that was something that he was involved in."

4 And then I asked you, "That wasn't something that Eaton
5 Vance requested?"

6 And you said, "No."

7 Do you see that?

8 MS. AYCOCK: Objection, calls for --

9 THE WITNESS: I do.

10 THE COURT: And to the extent that there was any
11 inconsistency, I'll let it stand. But it says what it says.

12 MS. BEAUMONT: Okay. I have no further questions,
13 Judge.

14 THE COURT: All right. Thank you.

15 CROSS-EXAMINATION

16 BY MR. LIEBERMAN:

17 Q Good morning, Mr. Sveen. How are you? Actually,
18 good --

19 A Good morning.

20 Q -- afternoon.

21 A Yeah. Okay.

22 Q It's morning somewhere.

23 A Exactly.

24 Q Are you familiar with LCM?

25 A Yes, I am.

1 Q They're an investment firm that invests in large
2 financings. Right?

3 A That's what I understand, yes.

4 Q And you don't view LCM as a predatory lender. Right?

5 A No, I don't.

6 Q Do you recall reaching out to LCM regarding joining the
7 exchange that was consummated in June 2020?

8 A No.

9 Q Do you recall reaching out to LCM regarding any
10 alternative structure?

11 A No, I wouldn't have personally done that anyway, but I
12 don't believe my team did either.

13 Q Are you aware of anyone in the Ad Hoc Group asking LCM
14 to participate in the transaction?

15 A I'm not aware of that, no.

16 Q You're aware that the parties amended the 2016 credit
17 agreement as part of the June 2020 transaction. Right?

18 A Yeah.

19 Q And you're also aware that the superpriority lenders
20 entered into a new credit agreement. Right?

21 A That's correct.

22 Q As well as a new inter-creditor agreement?

23 A Yes, that's my understanding.

24 Q And the open market purchase and exchange agreement?

25 A I'm sorry, you're speaking about new credit agreements

1 and then you mentioned --

2 Q The inter-creditor --

3 A -- the provision, the open market provision.

4 Q Yes. No, no, sorry, what I was trying to get at, there
5 was a number of agreements that were signed at once to
6 effectuate the June 2020 transaction. One of those
7 including the, I think it's called the open market exchange
8 and open market purchase agreement, something like that.

9 A I haven't read that document or -- I know it was an
10 open market purchase consummated, but I'm not familiar with
11 the specific document you're referring to.

12 Q Okay. But you agree that there were a number of
13 documents and the amendment, including the amendment to the
14 June -- the 2016 credit agreement that were signed during
15 the --

16 A Yes.

17 Q -- transaction? Now from your point of view --

18 A For 2020, yes.

19 Q -- yeah, and from your -- what's that?

20 FEMALE SPEAKER: (Indiscernible).

21 BY MR. LIEBERMAN:

22 Q Sorry, go ahead, repeat your answer.

23 A You're referring to the 2020 transaction, that there
24 were a number of documents signed, and that's true.

25 Q And from your point of view the amendment to the 2016

1 term loan agreement and the entry into the other transaction
2 documents happened together. Right?

3 A Well, yeah, once again --

4 MS. AYCOCK: Objection, Your Honor --

5 THE WITNESS: -- yes, but referring to other
6 documents, I'm not --

7 THE COURT: So, Mr. Sveen, hold on --

8 THE WITNESS: -- it's not a lot of specificity.

9 THE COURT: Mr. Sveen, hold on just one second,
10 there's been an objection raised.

11 Yes, ma'am?

12 MS. AYCOCK: Calls for a legal conclusion.

13 THE COURT: So, Mr. Lieberman, I had difficulty
14 with the question the way -- in the way that you asked it.
15 I'm not sure I understand that it calls for a legal
16 conclusion. But if you want to help me understand the
17 point, maybe it would be better if you tried to ask that
18 again.

19 BY MR. LIEBERMAN:

20 Q Did Eaton Vance ever consider approving the amendments
21 to the 2016 credit agreement without participating in the
22 debt repurchase?

23 A Well, there was only one transaction presented and it
24 was all -- it was one transaction together, so that was the
25 transaction to consider and that's the one that we signed

1 and agreed to.

2 Q It was all one transaction.

3 A The repurchase at a discount event through the market
4 purchase provision and superpriority debt, yes. And the
5 consideration coming from the second superpriority debt,
6 that all those components worked together with the new
7 money, yes. All of those work together along with other
8 items that were negotiated in that document and that there
9 was a number of other items that were also agreed to in
10 order for that -- you know, every component was important
11 for us to agree to it.

12 Q And you would not have done one without the other, or
13 one part of them without the other. Right?

14 A Well, it's just speculation now and I'm not sure which
15 part we're referring to. So really at that time we decided
16 all those different components together and we negotiated
17 the documents with -- or I believe we negotiated all sorts
18 of specific terms. And all those things together
19 consummated and we signed on that.

20 So everything was heavily negotiated, all those
21 different components coming together for that deal to be
22 signed. So we would have -- so if one component was
23 missing, of course it's just speculation whether that would
24 have been sufficient for us to continue. But it wasn't, so,
25 we put all those components together and that's what we

1 signed off on.

2 MR. LIEBERMAN: Okay. Thank you very much,
3 Mr. Sveen.

4 THE COURT: All right.

5 THE WITNESS: All right. Thank you.

6 MR. MILLAR: Good afternoon, Your Honor. James
7 Millar of Faegre Drinker.

8 CROSS-EXAMINATION

9 BY MR. MILLAR:

10 Q Good afternoon, Mr. Sveen. I'm James Millar, I
11 represent Citadel. Nice to meet you, at least virtually.

12 A Good afternoon.

13 Q Just a couple of questions.

14 A Good afternoon.

15 Q I believe you said that the indemnity for the 2020
16 transaction was important. Was that right?

17 A Well, I think -- I'm not sure in what context, but,
18 yeah, it is important.

19 Q Okay.

20 A I would agree with that statement.

21 Q Sure. And that indemnity runs in favor of those that
22 participated in the 2020 transaction. Correct?

23 MS. AYCOCK: Objection, calls for a legal
24 conclusion.

25 THE COURT: Overruled.

1 THE WITNESS: I'm not --

2 THE COURT: Mr. Sveen, if you can answer it,
3 answer it. Don't guess, just if you can answer, answer,
4 otherwise say you don't know. Don't guess.

5 THE WITNESS: Yeah, I'm sorry, yeah, I'd have to
6 re-read it and probably consult with counsel. I'm not
7 100 percent sure.

8 BY MR. MILLAR:

9 Q Okay. But it runs in favor of Eaton Vance as a
10 participant in the 2020 transaction. Correct?

11 A Well, indemnity clauses can go both ways in favor of
12 both, you know, both the lenders and the borrower. I think
13 indemnity clauses are generally -- in credit agreements are
14 really to protect both sides. So I'd have to look once
15 again at the specific portion of the provision you're
16 speaking to, as opposed to just generally.

17 Q I'm sorry, Mr. Sveen, I don't mean for this to be a
18 difficult question. Eaton Vance has an indemnity against
19 the company for the 2020 transaction. Correct?

20 A Yes.

21 Q And so do the other participants in the 2020
22 transaction. Correct?

23 A I believe so.

24 Q And that indemnity continues in the proposed Chapter 11
25 Plan. Correct?

1 A Yes, I believe it does, but I have not been close to
2 the discussions of the most recent plan.

3 Q And it --

4 A So I don't know the particulars of that.

5 Q Okay. And the indemnity exists in the proposed exit
6 financing. Correct?

7 A I know there's an indemnity, I don't know all the
8 details of it.

9 Q There is an indemnity in the exit financing for those
10 that participated in the 2020 transaction. Correct?

11 THE COURT: So, Mr. Sveen --

12 THE WITNESS: I --

13 THE COURT: Well, hold on just one second. As I
14 understand it --

15 THE WITNESS: Yeah.

16 THE COURT: -- you now work for a different
17 company. Correct?

18 THE WITNESS: I work for Morgan Stanley, yes.

19 THE COURT: Right. So --

20 THE WITNESS: Morgan Stanley purchased Eaton
21 Vance.

22 THE COURT: No, I know that. But I assume that
23 you have different duties these days.

24 Have you been involved in that negotiation and
25 reviewing that credit agreement?

1 THE WITNESS: The most recent one, the -- no, I
2 have not been. I have not been involved in the most recent
3 negotiations, I've just been kept aware of it by my team
4 members and we've had counsel on the ground working on these
5 specific clauses.

6 THE COURT: All right. Thought I was going to
7 help, apparently I wasn't. My apologies.

8 BY MR. MILLAR:

9 Q Mr. Sveen, you understand that debt under credit
10 agreements trades in the market. Correct?

11 A In the market meaning? Can you just clarify what you
12 mean by the market?

13 A I mean debt under credit agreements, such as the FLSO
14 debt and the FLFO debt, is available to be purchased in the
15 market. Is that right?

16 A There's a secondary, an active secondary trading market
17 for the buying and selling of this particular transaction
18 and other large syndicated loans, yes.

19 Q So the FLSO debt can trade in the market, yes?

20 A Yes.

21 Q And the --

22 A Trade in the syndicated market.

23 Q And the FLFO debt could trade in the secondary market,
24 yes?

25 A I'm sorry the FL -- the second one, or the FL --

1 Q FLFO, first lien first out debt.

2 A Yes, unless there's restrictions in the credit
3 agreement that limit the trading activity of that and it
4 should be able to trade in secondary, yes, and --

5 Q So a party could sell their FLFO and FLSO debt, yes?

6 A Once again, unless there's restrictions in the credit
7 agreement that limit the trading activity of that particular
8 tranche or limits the -- who you're selling it to.

9 Q And a party that sells the FLFO and FLSO would still
10 get an indemnity from the Reorganized Debtors. Is that
11 correct?

12 A I don't know, I think we lost -- that's not my -- I
13 don't have -- I would have to consult counsel and understand
14 the situation better to be able to respond to that.

15 Q Okay. Thank you.

16 A Thank you.

17 THE COURT: All right. Thank you.

18 Is there any Recross -- or any Redirect?

19 MS. AYCOCK: Nothing further, Your Honor.

20 THE COURT: All right. Any reason Mr. Sveen
21 cannot be excused?

22 (No audible response.)

23 THE COURT: All right. Mr. Sveen, I very much
24 appreciate your participation this afternoon. You are free
25 to go. To the extent that you would have any interest, and

1 I can't imagine you would, you are released from the Rule
2 and you are free to view the proceedings if you so wish.

3 THE WITNESS: I think I'll check out, but thank
4 you, Your Honor, appreciate it.

5 (Laughter.)

6 THE COURT: Okay. Thank you, sir.

7 THE WITNESS: All right. Bye now.

8 THE COURT: Bye.

9 (Witness excused.)

10 MR. SCHROCK: We've got to make this more exciting
11 again, Your Honor.

12 Could we take another just short break just so we
13 can get out next witness on? It's going to be Michael
14 Searles of Barings.

15 THE COURT: Michael Searles.

16 MR. SCHROCK: And he is going to be testifying
17 remotely as well, and he's obviously not watching what's
18 going on.

19 THE COURT: Ah, so you need -- sure.

20 MR. SCHROCK: We just need to get him on and --

21 THE COURT: So maybe 2:40?

22 MR. SCHROCK: That would work fine.

23 THE COURT: All right. Thank you.

24 We'll be adjourned until 2:40.

25 THE CLERK: All rise.

1 (Recess taken from 2:33 p.m. to 2:44 p.m.)

2 AFTER RECESS

3 THE COURT: Thank you.

4 Mr. Searles, good afternoon. Could you just
5 confirm for me that you can hear me?

6 MR. SEARLES: Yes, Your Honor.

7 THE COURT: All right. Thank you.

8 And we are back on the Record in Case
9 No. 23-90020. We ready to start with Mr. Searles?

10 MS. WALLEN: Yes. Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MS. WALLEN: Allison Wallen from Gibson Dunn on
13 behalf of the PTL Lenders and the additional counterclaim
14 Defendants.

15 THE COURT: All right. Thank you.

16 Mr. Searles, if you'd please raise your right
17 hand, please, sir?

18 (Witness sworn.)

19 THE COURT: All right. Thank you.

20 Counsel, whenever you're ready.

21 DIRECT EXAMINATION

22 BY MS. WALLEN:

23 Q Good afternoon, Mr. Searles.

24 THE COURT: Before I do this, let me get you all
25 situated.

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MS. WALLEN: Thank you, Your Honor.

THE COURT: All right. Give Mr. Herndon just a moment to get everything up and running.

(Pause in the proceedings.)

THE COURT: All right. He's good. Sorry about that. Whenever you're ready.

MS. WALLEN: Thank you, Your Honor.

BY MS. WALLEN:

Q Good afternoon, Mr. Searles.

A Good afternoon.

Q Have you watched or listened to any other witness's testimony in this hearing?

A No.

Q Where are you currently employed?

A Barings, LLC.

Q What is Barings?

A Barings is a \$350 billion global asset manager.

Q How long have you worked at Barings?

A Approximately five years.

Q So since 2018?

A Yes.

Q What is your position at Barings today?

A I'm a managing director in the capital solutions business and head of investments for North American capital

1 solutions.

2 Q What are your responsibilities in that position?

3 A I oversee all investments originated or managed out of
4 the capital solutions business within the firm, which is a
5 \$5 billion portfolio of assets. And I also oversee all
6 situations with respect to cross-platform investments or
7 investments made across the firm that come into or require
8 my group's level of expertise or capability.

9 Q Where did you work before Barings?

10 A Octagon Credit Investors.

11 Q Did you work anywhere before Octagon?

12 A I started my career at Credit Suisse.

13 Q Approximately how long have you been in this industry?

14 A Approximately 15 years.

15 Q After you joined Barings in 2018 did you come to learn
16 that Barings held Serta debt that was issued pursuant to a
17 2016 credit agreement?

18 A Yes.

19 Q When did you learn that?

20 A It would have been shortly after I started at Barings,
21 so some time in late 2018, early 2019.

22 Q What was Barings' involvement with Serta at that time?

23 A Funds that we manage had sizable positions in both the
24 first and second lien loans with Serta.

25 Q What were your responsibilities regarding Serta?

1

2 A I was involved in analyzing the company working with
3 analysts who had been following the company for some period
4 of time prior to that in evaluating the situation, the
5 business, current trading levels, and making recommendation,
6 or assisting recommendations throughout the firm with
7 respect to the firm's position in those loans.

8 Q Did you at some point review the 2016 credit agreement?

9 A From a businessperson's perspective, yes.

10 Q Generally how would you characterize the 2016 credit
11 agreement?

12 A In my view, again, from a businessperson's perspective,
13 it was similar to credit agreements originated in the
14 general duration of this, which would be generally
15 considered to be loose.

16 Q Was there something in particular that prompted you to
17 review the 2016 credit agreement?

18 A No.

19 Q Was that part of your regular practice?

20 A Yes.

21 Q When did you do this review of the Serta 2016 credit
22 agreement?

23 A Yes, as I stated, it would be part of our regular
24 practice, so any time I would be involved in a name or my
25 team would be involved in a situation, it would be standard

1 ordinary course to do an ongoing document reviews. It would
2 consist of an initial document review, leveraging all of our
3 internal and external resources, as well as the ongoing
4 reviews in the context of whatever situation is unfolding at
5 the time.

6 Q What were your responsibilities with respect to
7 Barings' investment in Serta debt in early 2020?

8 A We were -- continued to be a very large holder in both
9 first and second lien debt, my involvement would have been
10 the same as it had been leading up to 2020, which is
11 actively monitoring the company, evaluating trading levels,
12 evaluating in terms of strategic position with respect to
13 buying or selling those loans.

14 Q I'd like to fast forward to March of 2020. Did you
15 have communications with other holders of Serta debt in
16 March of 2020?

17 Q Yes.

18 Q Who did you speak to?

19 A I would have spoken to certainly the largest holders,
20 which would have included CSAM, Invesco, Eaton Vance, to
21 name a few. We would have also -- this would be a pretty
22 consistent trend with respect to companies in this position,
23 certainly during COVID. We would have gotten outreach from
24 a number of smaller holders or holders throughout the
25 capital structure. I can't -- couldn't tell you exactly who

1 that was, but that would have been pretty consistent and
2 would have occurred in this manner.

3 Q Was there anything in particular that prompted these
4 conversations?

5 A No, as I said, this would have been fairly standard
6 operating procedure for a company with loans trading at a
7 discount. Obviously at this time COVID was a pretty topical
8 situation, certainly within the -- with this company, and
9 therefore those conversations would have been geared around
10 the company's position with respect to COVID and how they
11 were going to manage through that.

12 Q After these initial conversations, did you engage
13 conversations did you engage with a group of lenders
14 including CSAM, Eaton Vance and Invesco that were advised by
15 Gibson Dunn?

16 A Yes.

17 Q What was the goal of the Gibson Dunn advised group of
18 lenders during the time in which Barings was participating
19 in discussions with them?

20 A While we were involved in discussions with that group
21 they were focused on hiring a financial advisor and really
22 focused on just formation up until the time when the main
23 focus was really putting up -- drafting a letter to send to
24 the company.

25 Q Did Barings eventually step away from the group of

1 holders advised by Gibson Dunn?

2 A Yes.

3 Q Why did Barings decide to step away from the Gibson
4 Dunn advised group?

5 A In our view the Gibson Dunn advised group at the time
6 didn't really have a direction or a purpose. We knew that
7 the company was actively exploring alternative transactions
8 in the context of the liability management transaction. We
9 understood the document was fairly loose and gave the
10 company significant flexibility with respect to a liability
11 management transaction.

12 Our view in -- overall in every situation, especially
13 in this one, was a direct outreach to the company to
14 indicate a willingness to participate in those transactions,
15 to be a partner with providing liquidity, and being a
16 constructive solution versus kind of engaging in a letter
17 writing campaign was the more constructive way to, well,
18 approach.

19 Q At the time Barings decided to pursue its own
20 transaction with the company, were you aware of any other
21 lender group seeking to make a proposal to the company?

22 A We were generally aware that there were other groups
23 out there, we were aware that this was going to be and was a
24 competitive process. We -- I can't say that we were
25 definitively aware of who those groups were and what their

1 motivations were.

2 Q Did you know what kind of proposal the other groups
3 were going to be making to the company?

4 A No.

5 Q Based on your assessment of the 2016 credit agreement
6 did you have an understanding of what the other groups might
7 have been proposing?

8 A Yeah, I think we would have assumed that the
9 transaction would have been similar, the transaction that
10 that they were proposing would have been similar to what we
11 were proposing.

12 Q And we'll get to that in a few minutes. After Barings
13 decided to step away from the group of holders advised by
14 Gibson Dunn, did you engage in discussions with Serta?

15 A Yeah.

16 Q What were those conversations?

17 A As I stated earlier, the goal was to make direct
18 outreach to the company or their advisors to indicate that
19 we wanted to be a solution provider. In this situation,
20 we're interested in advancing new money to the company and
21 wanted to engage in direct dialogue with them.

22 Q Did Barings eventually sign an NDA with Serta?

23 A Yes.

24 Q I'd like to show you what has been filed at Docket
25 Number 889-1, which is Debtor's Exhibit 104.

1 MS. WALLEN: If we could bring that up,
2 Mr. Herndon?

3 BY MS. WALLEN:

4 Q Mr. Searles, is this a May 1, 2020 email from Weil to
5 Barings' in-house counsel?

6 A Yes.

7 MS. WALLEN: And, Mr. Herndon, if we can go
8 forward to page 9, to see the attachment?

9 BY MS. WALLEN:

10 Q Mr. Searles, is this the confidentiality agreement
11 between Barings and the company?

12 A Yes.

13 Q And the NDA is dated May 1, 2020?

14 A Yes.

15 MS. WALLEN: Your Honor, I'd like to move to admit
16 Debtor's Exhibit 104 filed at Docket Number 889-1.

17 THE COURT: Any objection?

18 MR. SCHROCK: No objection, Your Honor.

19 THE COURT: Thank you. It's admitted.

20 MS. WALLEN: Thank you, Your Honor.

21 (Exhibit 104, ECF 889-1, received in evidence.)

22 BY MS. WALLEN:

23 Q What happened next after Barings entered into this NDA
24 with Serta?

25 A We quickly continued to have discussions with the

1 company, this time on a more granular level. We would have
2 sent over a diligence list, and for standard ordinary course
3 of business diligence that we would conduct with any new
4 money transaction, and we got to work with internal and
5 external counsel on formulating a proposal to be shared with
6 the company.

7 Q Do you recall approximately when Barings made its first
8 proposal to Serta?

9 A It would have been around early May.

10 Q I'd like to show you what has been filed at Docket
11 Number 863-9, which is Debtor's Exhibit 116.

12 MS. WALLEN: If we can bring that up? Thank you.

13 BY MS. WALLEN:

14 Q Is this an email from you to Evercore on May 8, 2020
15 with an attached summary term sheet?

16 A Yes.

17 MS. WALLEN: I'd like to move to admit Debtor's
18 Exhibit 116 filed at Docket Number 863-9.

19 THE COURT: Thank you.

20 Any objection?

21 MR. SCHROCK: No objection.

22 THE COURT: Thank you. It's admitted.

23 MS. WALLEN: Thank you.

24 (Exhibit 116, ECF 863-9, received in evidence.)

25 BY MS. WALLEN:

1 Q At a high level, Mr. Searles, can you tell what Barings
2 was proposing to Serta?

3 A We were proposing a transaction whereby the company
4 would designate certain intellectual property assets to an
5 unrestricted subsidiary. That unrestricted subsidiary would
6 be financing two components, the first being a new money
7 component consisting of somewhere between 150- and \$200
8 million new money to be used for liquidity for the business,
9 with a subsequent tranche of debt that would be used for the
10 purposes of effectuating a repurchase of our first and
11 second lien debt.

12 Q After this initial proposal were there negotiations
13 back and forth between Barings and Serta?

14 A Yes.

15 Q Do you recall how many rounds of negotiations there
16 were?

17 A It would have been at least three.

18 Q How would you characterize the negotiations between
19 Barings and Serta?

20 A I would characterize them as being fairly typical for
21 any competitive process, auction or competitive financing
22 that I've been a part of in my career.

23 Q I'm not going to take the time to go through all of the
24 term sheets that were exchanged back and forth, but I would
25 like to show you what has been filed at Docket No. 864-38,

1 which is Debtor's Exhibit 195.

2 Is this a June 4, 2020 email from Freshfields to Weil
3 and Evercore with an updated draft of the term sheet in
4 response to Serta's last comments?

5 A Yes.

6 Q Was Freshfields representing Barings at this time in
7 connection with a potential transaction with Serta?

8 A Yes.

9 MS. WALLEN: I'd like to move to admit Debtor's
10 Exhibit 195 filed at Docket Number 864-38.

11 THE COURT: Thank you. Any objection?

12 MR. SCHROCK: No objection.

13 THE COURT: Thank you. It's admitted.

14 MS. WALLEN: Thank you, Your Honor.

15 (Exhibit 195, ECF 864-38, received in evidence.)

16 BY MS. WALLEN:

17 Q Did Barings get a response from Serta from its June 4
18 counterproposal?

19 A Yes.

20 Q What was Serta's response?

21 A I got a call the next day from the company's financial
22 advisor indicating that they were not going to move forward
23 with our proposal, they were going to move forward with an
24 alternative proposal, and they had asked us to evaluate that
25 and determine whether we'd like to be part of it.

1 Q The phone call that you received from the company's
2 financial advisor, who in particular was that from?

3 A Roopesh Shah.

4 Q Did Mr. Shah tell you which proposal the company had
5 decided to move forward with?

6 A I believe so, yeah.

7 Q Which group?

8 A It would have been a group that would consist of a
9 majority of holders in the first lien and second lien loans
10 of Serta.

11 Q Was it the Gibson Dunn advised group that you had
12 initially been in discussions with?

13 A Yeah.

14 Q If I call them the "PTL Lenders," does that work for
15 you?

16 A Yeah.

17 Q Did Mr. Shah or Evercore provide you with any
18 information about the PTL Lenders' proposal?

19 A In a brief conversation on the day after this last term
20 sheet was provided from us, I believe he walked us through
21 at a very high level the summary terms and structure of the
22 transaction, but indicated that we would get a more
23 substantive term sheet later in the day.

24 Q What was your reaction to learning that Serta had
25 decided to go with the PTL Lenders' proposal?

1 A We indicated we would evaluate the transaction and come
2 back to the company shortly thereafter once we had all of
3 the information available to make a determination.

4 Q What did you conclude from you evaluation of the PTL
5 Lenders' proposal?

6 A Well, we concluded broadly that the economic treatment
7 for us was broadly similar to that in which were proposing
8 as a stand-alone plan. There were certain attributes or
9 benefits to pursuing this transaction, the one we ultimately
10 pursued. We believe that the transaction we were
11 contemplating, given that it was a designation of certain
12 intellectual property, would have involved evaluation of
13 that intellectual property and would bring potential
14 litigation or judgment risk into the transaction.

15 This was, from our perspective, a cleaner more
16 efficient transaction that didn't have those same risks. It
17 also required us to advance substantially less new money
18 than we would have in a sole Barings-led transaction.

19 Q I'd like to show you what has been filed at Docket
20 Number 865-3, which is Debtor's Exhibit 210.

21 Is this an email from Bryan High (phonetic) to you and
22 several others at Barings dated June 5, 2020?

23 A Yes.

24 MS. WALLEN: I'd like to move to admit Debtor's
25 Exhibit 210 filed at Docket Number 865-3.

1 THE COURT: Any objection?

2 MR. SCHROCK: No objection.

3 THE COURT: It's admitted.

4 (Exhibit 210, ECF 865-3 received in evidence.)

5 BY MS. WALLEN:

6 Q Mr. Searles, what's being discussed in this email?

7 A This looks like emails from two individuals at Barings
8 to two different investment committees at Barings who would
9 have had positions in the name, outlining the terms of the
10 transaction and indicating very high level views.

11 MS. WALLEN: And if we scroll down a little bit
12 further, Mr. Herndon, so we can see the rest of the bottom
13 email?

14 THE COURT: Sorry, I blew it up so I could read
15 it.

16 MS. WALLEN: Oh. Is there a particular portion
17 Your Honor would like to see?

18 THE COURT: No, it's just I changed the screen.

19 MS. WALLEN: Oh, okay.

20 THE COURT: I put it back to where it was.

21 MS. WALLEN: We can blow it up again.

22 THE COURT: I'm fine. Thank you.

23 MS. WALLEN: And if we zoom in on the bottom,
24 towards the bottom of the page, Mr. Herndon, where it stars
25 with, "We believe?"

1 BY MS. WALLEN:

2 Q And Mr. Stewart wrote, "We believe this new transaction
3 is attractive as the economics work out to similar levels
4 for Barings, but significantly de-risks the investment
5 Barings could have done on its own. The group that formed
6 and represented less than 50 percent of 1-L holdings has
7 also agreed to this transaction, and though Barings was not
8 part of the group, we are receiving the same opportunity and
9 terms as the group."

10 Do you see that, Mr. Searles?

11 A Yes.

12 Q Okay. Switching topics slightly --

13 MS. WALLEN: You can take that down, Mr. Herndon.

14 BY MS. WALLEN:

15 Q -- Mr. Searles, are you aware that there is an
16 indemnity provision in the priority term loan agreement
17 whereby the borrower indemnifies the lender for losses,
18 damages or claims including in connection with the
19 transaction?

20 A Yes.

21 Q Did Barings want an indemnity provision in the priority
22 term loan agreement?

23 A Yes.

24 Q Why?

25 A As far as I'm aware -- and this would be better suited

1 to be answered by counsel, internal or external, but from my
2 perspective indemnities are pretty standard practice in any
3 transaction we're involved in.

4 Q Do you understand that this will be a go-forward
5 indemnification obligation?

6 A Yes.

7 Q Is that important to Barings, that the indemnity go
8 forward?

9 A Yes.

10 Q Why?

11 A There's been active ongoing litigation in this company
12 for three years since the transaction has been done. It was
13 -- there has been litigation even prior to the transaction
14 closing, and there's every reason to believe, or to be sure
15 that there's going to be litigation following this company
16 emerging from bankruptcy.

17 Q Did Barings vote in favor of the Plan of
18 Reorganization?

19 A Yes.

20 Q If the plan and the take-back debt did not provide for
21 a go-forward indemnity following plan effectiveness, would
22 Barings have voted in favor of the plan?

23 A No.

24 Q Are you aware that Citadel has made a proposal to
25 provide exit financing for the Reorganized Debtor and

1 replace the take-back paper?

2 A Yes.

3 Q If that proposal had the effect of removing Serta's go-
4 forward indemnity for the priority lender group for claims
5 related to the June 2020 transaction, would you view that as
6 adverse to Barings?

7 A Yes.

8 Q Was Barings' support of the plan dependent on Barings
9 receiving an on-going indemnity?

10 A Yes.

11 Q Why?

12 A As I said earlier, there's been ongoing litigation on
13 this company and this transaction for three years, and it --
14 we have every reason to expect it's going to continue
15 following emergence.

16 Q Defendants have argued in this case that at the time of
17 the 2016 credit agreement, and even as late as 2020, the
18 credit industry did not expect that a transaction like the
19 2020 transaction could occur.

20 What's your reaction to that?

21 A Based on my experience in the market, in 2016 any
22 institution that was involved in making loans or purchasing
23 loans would have had a process in place and would have very
24 well understood the document erosion with an ongoing theme
25 in the industry, and would have -- that would have been a

1 topical point for any ongoing, even an initial credit
2 review. Certainly thereafter transactions which highlighted
3 the flexibility that companies have with respect to these
4 documents, those processes and procedures to do ongoing
5 reviews of documents would have strengthened and would have
6 become more formalized such that at any point from the time
7 that the loan was issued until the transaction any lender
8 who has acted in this market would have had a process and
9 would have had an understanding of the documents and the
10 flexibility that the company had as a result of that.

11 Q Mr. Searles, had you seen a transaction structure like
12 this before?

13 A Yeah, I've seen transaction structure like this before.
14 Every transaction is unique and so I've never seen a
15 transaction that's identical to another one in my career,
16 but there have been transactions that have been similar in
17 certain aspects to this one.

18 Q Were you ultimately comfortable with this transaction
19 structure?

20 A Yes.

21 Q Why?

22 A First and foremost, the company was asking for and
23 needed new money, there was a competitive process and many
24 institutions as I understand it that were willing to provide
25 that new money, there's a competitive assessment with

1 respect to what the company can do and pursue in the context
2 of liability management. We felt very comfortable with
3 respect to what the document said and allowed for, and this
4 provided the company with everything it needed to continue
5 to go forward.

6 Q Would Barings have participated in the 2020 transaction
7 if it did not believe doing so was in good faith?

8 A No.

9 Q If Serta had decided to go with the proposal submitted
10 by Apollo, Angelo Gordon and Gamut instead, and Barings was
11 invited to participate in that deal, would you have done so?

12 A We would have had to evaluate that transaction to
13 determine if it was something that we deemed to be suitable
14 for us, but assuming it was, yeah.

15 MS. WALLEN: Thank you, Mr. Searles. I have no
16 further questions.

17 THE COURT: All right. Thank you.

18 Does anyone else have questions in support of
19 confirmation? Just checking.

20 (No audible response.)

21 THE COURT: All right. Thank you.

22 Can you flip your camera on for me?

23 MR. CARLOCK: Yes.

24 THE COURT: Thank you.

25 Mr. Carlock has control, you should be ready.

1 MR. O'LOUGHLIN: Thank you, Your Honor. Just give
2 me a moment to organize my notes here.

3 THE COURT: Take all the time you need.

4 (Pause in the proceedings.)

5 CROSS-EXAMINATION

6 BY MR. O'LOUGHLIN:

7 Q Good afternoon, Mr. Searles. Robert O'Loughlin from
8 Paul Weiss on behalf of the Excluded Lenders.

9 I just want to go over a few points of your testimony
10 to get some clarification here. I believe you said that
11 Barings stepped away from the Gibson Dunn Group some time
12 before May 2020. Is that right?

13 A Yes.

14 Q And then for a period of time Barings was negotiating
15 its own financing transaction with Serta. Correct?

16 A Yes.

17 Q And your counsel showed you what I believe was Debtor's
18 Exhibit No. 1 -- I'm sorry, which one was it, Debtor's
19 Exhibit No. 116 which was filed in the main bankruptcy
20 proceeding at Docket 863-9.

21 MR. O'LOUGHLIN: Could we put that up on the
22 screen?

23 BY MR. O'LOUGHLIN:

24 Q And if you flip ahead to the term sheet that's attached
25 to this document, this is the initial term sheet that

1 Barings proposed to Serta on May 8, 2020. Is that correct?

2 A Yes.

3 Q Okay. Now I believe you testified that under this
4 proposal, Barings would have funded a new term loan
5 facility. Is that correct?

6 A Yes.

7 Q And this proposal also would have included a debt
8 exchange where affiliated funds of Barings would have
9 exchanged all of their first and second lien terms loans at
10 a discount. Is that correct?

11 A Yes, I mentioned that it would have effectuated a
12 re-purchase, there would have been a second tranche that
13 would have effectuated a re-purchase of our first and second
14 lien loans.

15 Q Understood. Thanks for that clarification.

16 And in consideration for this exchange in the new money
17 facility, Barings would have received new senior secured
18 loans with first priority liens against the equity interest
19 in assets of newly created IPCO. Is that correct?

20 A Yes.

21 Q Okay. And the lenders who would have participated in
22 that transaction would have been limited to the affiliated
23 funds of Barings. Is that correct?

24 A Yes.

25 Q And in this term sheet there's nowhere mention here of

1 any amendment to the credit agreement that would have been
2 needed to effectuate this. Is that correct?

3 A Not that I can recall.

4 Q Looking at the term -- feel free to look at the term
5 sheet.

6 Do you see anywhere in there that there would be an
7 amendment to the credit agreement?

8 A No, not that I can see.

9 Q Now you're aware that the Angelo Gordon Group proposed
10 a deal with the same structure and it differed only on the
11 economics. Is that correct?

12 A I became aware of it, I think, when materials were
13 blown out consequent to the transaction.

14 Q And you may have said this before, and if not, forgive
15 me. I think you testified that you believed this
16 transaction structure that was proposed by Barings was
17 permissible under the existing credit agreement and --
18 within the four corners of the credit agreement. Is that
19 correct?

20 A Yes.

21 Q Okay. Did you believe that if Serta had accepted this
22 offer, that it would have constituted an actual or
23 constructive fraudulent transfer in violation of applicable
24 law?

25 A I'm not equipped to make that determination, that would

1 be -- we would -- I would rely on internal and external
2 counsel to advise me.

3 Q Would it surprise you if Gibson Dunn had sent a letter
4 to UBS, the administrative agent for the Serta term loans,
5 and argued that a transaction structure like this would
6 potentially be an actual or constructive fraudulent
7 transfer?

8 A I've been doing this for a long time, nothing like that
9 would surprise me, but --

10 (Laughter.)

11 THE WITNESS: -- I don't feel I have a
12 perspective on that.

13 MR. O'LOUGHLIN: I'm not sure what that says about
14 the legal profession, but thank you for that.

15 BY MR. O'LOUGHLIN:

16 Q Now, Mr. Searles, I believe you -- well, let me back
17 up.

18 I take it be that you would not agree with the Gibson
19 Dunn position on that?

20 A If we would have agreed with it, I wouldn't have had
21 permission to send a term sheet.

22 Q Thank you.

23 Now, Mr. Searles, I believe you testified that after
24 you sent this term sheet you engaged in some continued
25 rounds of negotiation -- or, sorry, Barings engaged in

1 continued rounds of negotiation with Serta. Is that
2 correct?

3 A Yes.

4 Q And in these negotiations, Barings never proposed an
5 uptier style transaction of the type that was actually
6 consummated in June of 2020. Is that correct?

7 A No.

8 Q Your negotiations with Serta focused on this dropdown
9 IPCO style of transaction. Correct?

10 A Yes.

11 Q Now I'd like to turn back to another exhibit that your
12 counsel showed. Let me get it in front of me.

13 I believe this was Debtor's Exhibit 210, which would
14 have been, pardon me, filed on the main bankruptcy docket at
15 ECF Number 865-3.

16 Do you recall looking at those documents?

17 A Yeah.

18 Q And this is the email following Barings' receipt of
19 news from Serta that it was going with the Gibson Dunn
20 Group's uptier proposal. Is that correct?

21 A Yes.

22 Q And your counsel walked through some of the language in
23 this docket, but I just want to make sure we've covered some
24 of this.

25 In the first email in this chain, which is at the

1 bottom of the first page, it's from Mr. Jeffrey Stewart at
2 Barings. Do you see that?

3 A Yeah.

4 Q And who is Mr. Stewart?

5 A He's a former employee of Barings.

6 Q What was his position at this time?

7 A He was a research analyst.

8 Q Okay. And he says that first, "We were informed this
9 afternoon that Serta Simmons has decided to pursue a
10 different structure than the one we internally had
11 proposed."

12 Do you understand Mr. Stewart there to be referring to
13 the difference between the uptier transaction that was now
14 on the table versus the dropdown transaction you had been
15 negotiating?

16 A Yeah, said differently, the transaction, I believe
17 there's a term sheet that's attached to this email, the
18 transaction that's in the term sheet attached to this email.

19 Q Fair enough. And the new proposal that the company was
20 now offering had a different structure than the one you had
21 been negotiating with them over the past month. Is that
22 correct?

23 A Yes.

24 Q Okay. Mr. Stewart goes on to say, "And we love carving
25 out assets into an unrestricted subsidiary. The new

1 structure will amend the pro rata provision at OPCO to
2 create a priority tranche that sits above the current first
3 and second lien notes."

4 Do you see that?

5 A Yes.

6 Q And just to reiterate, the proposal that you had been
7 negotiating over the past month, did not include any
8 amendments to the credit agreement. Correct?

9 A Correct.

10 Q Including any amendments to the pro rata provision?

11 A Correct.

12 Q Mr. Stewart further writes, this is in the -- if you
13 look at the bullet points, the third -- the top level black
14 bullet point down, he writes, "The new money is offered on a
15 pro rata basis for 1-L holdings to approximately 50 percent
16 of lenders, which mean Barings will have 20 percent of the
17 new money exposure of \$40 million." Do you see that?

18 A Yes.

19 Q Now if my math is right, I think that works out that
20 Barings had about 10 percent of Serta's 1-L holdings. Is
21 that correct?

22 A That would be the proper math equation, yes.

23 Q I'm glad my arithmetic still works. Below that, now at
24 the bottom, Mr. Stewart summarizes -- this is in the
25 paragraph at the bottom of this page and continuing on to

1 the top of the next one -- We believe this new transaction
2 is attractive as the economics work out to similar levels
3 for Barings, but significantly de-risks the investment
4 Barings could have done on its own.

5 I believe you testified earlier that this de-risking
6 referred to Barings advancing less capital. Is that
7 correct?

8 A Advancing less capital and also inviting less
9 litigation. Right.

10 Q I guess that was a dream at the time. A group that
11 formed and represented less than 50 percent of the 1-L
12 holdings has also agreed to this transaction, and though
13 Barings was not part of that group we are receiving the same
14 opportunity/terms as the group that negotiated the above
15 terms. Do you see that?

16 A Yeah.

17 Q Okay. And I believe you said earlier that this
18 proposed -- you viewed this proposed structure from Serta as
19 broadly similar -- sorry, strike that.

20 You said earlier that you viewed this proposal from
21 Serta to be broadly similar to the transaction that you had
22 proposed. Is that correct?

23 A In terms of the economic treatment to work on, yes.

24 Q Okay. So now going up to the next email above this
25 from Mr. Martin Horn -- or, I'm sorry, from Mr. Bryan High

1 to Martin Horn. Do you see that?

2 A Yes.

3 Q And who is Bryan High?

4 A He's the head of capital solutions.

5 Q Mr. High writes, and this is at the bottom of this
6 email, the second paragraph up, second sentence, "Fantastic
7 landing point from my perspective to the extent we push it
8 over the finish line in documentation."

9 Do you see that?

10 A Yes.

11 Q Do you know what Barings did to get this fantastic
12 offer from Serta that was not offered to the Angelo Gordon
13 Group?

14 A I can only presume that he was referring to making a
15 good faith effort to negotiate with the company and putting
16 our best foot forward in the process such that they viewed
17 us as an attractive partner.

18 Q Now this proposal that you received from Serta does not
19 contemplate offering at the new money provision on a pro
20 rata basis to all the existing 1-L lenders. Is that
21 correct?

22 A Correct.

23 Q And indeed it's correct that this fantastic transaction
24 for Barings would not have occurred if 100 percent of the
25 lenders would have participated. Correct?

1

2 A This transaction would not have occurred if 100 percent
3 of the lenders would have participated.

4 Q Mr. Searles, you don't know what criteria may have been
5 used to select -- what criteria Serta may have used to
6 select Barings to participate in this transaction. Correct?

7 A I do not, no.

8 Q You don't know whether all existing Serta lenders
9 received the same opportunity as Barings?

10 A I do not know. I have a sense that that's not the case
11 based on all of the subsequent litigation, but I don't know
12 that for sure.

13 Q Okay. In fact, you don't even know who it was who made
14 the decision to ask Barings to participate in the
15 transaction. Correct?

16 A I do not, no.

17 Q Mr. Searles, I believe you said earlier that you are
18 not aware of a transaction prior to Serta that had the
19 particular characteristics of this Serta transaction. Is
20 that correct?

21 A Yes, I think I said that I'm now aware of any
22 transaction that was exactly the same as this.

23 Q Right. And that's because different credit agreements
24 have different terms and they are informed by those very
25 specific documents. Is that correct?

1 A It's far more complex than that. Different credit
2 agreements have different terms, different companies that
3 face a different situation, have different goals, different
4 capital stacks exist throughout, different companies that --
5 like I said, I've never been a part of any transaction that
6 has been identical to another one.

7 Q Mr. Searles, last line of questioning here for you, I
8 believe you testified earlier that Barings wanted an
9 indemnity here. Is that correct? As part of the 2020
10 transaction?

11 A Yes.

12 Q Did you say yes?

13 A Yes.

14 Q Thank you, sir.

15 There's a lag on your video feed and audio feed, so we
16 were talking over each other.

17 Mr. Searles, do you remember giving a deposition
18 in this case approximately two weeks ago?

19 A Yes.

20 Q Okay. And you were asked -- this is on page 212 of
21 your deposition transcript starting at Line 1, "As the
22 corporate representative for Barings on Topic Number 12, do
23 you have any understanding of the indemnification
24 obligations that Serta owes Barings?

25 "Answer, I have an understanding that one exists, I

1 don't have any other detailed understanding beyond that.

2 That would be something that I would rely on my attorneys to
3 inform me about."

4 Do you see that testimony, sir?

5 A Yes.

6 Q That was your answer two weeks ago?

7 A Yes.

8 Q Mr. Searles, my question to you is what --

9 MS. WALLEN: Your Honor?

10 MR. O'LOUGHLIN: Do you have an objection?

11 MS. WALLEN: Your Honor, improper impeachment.

12 THE COURT: What statement was it that you were
13 using that to impeach?

14 MR. O'LOUGHLIN: So Mr. Searles has testified
15 today that Barings affirmatively wanted an indemnification,
16 two weeks ago he said that he did not have any understanding
17 of what the indemnification was.

18 But I can move on, Your Honor, maybe I can ask a
19 question that gets us past this.

20 THE COURT: All right. Thank you.

21 BY MR. O'LOUGHLIN:

22 Q Mr. Searles, my question to you is: What did you do is
23 what did you do in the last two weeks to educate yourself
24 about the indemnification obligation?

25 A Maybe I don't understand what's going on here, but the

1 line of questioning relative to the deposition doesn't make
2 a whole lot of sense.

3 I'm aware that an indemnification exists, I'm aware
4 that I routinely ask for one and ensure that, you know,
5 we're getting one. I rely on our lawyers to ensure that it
6 is drafted and documented in accordance with the market. I
7 think that's totally consistent with my deposition testimony
8 and the testimony I've given today.

9 Q That's fair, Mr. Searles, but my question was, and
10 maybe I'll ask it a different way, did you do anything in
11 the last two weeks to educate yourself on the particular
12 indemnification obligations that exist under the -- that
13 exist under the 2020 agreement?

14 A No, it would be totally out of my league to do anything
15 to educate myself on something that I would rely on counsel
16 for.

17 Q Okay. Did you do anything to educate yourself about
18 what Barings would have wanted in 2020?

19 A Well, other than what I knew then which was we would
20 get an indemnity and we would expect one pursuant to any
21 other transactions they do, but nothing else.

22 Q Okay. And this is a yes/no question, did you speak
23 with counsel about this indemnification obligation in the
24 past two weeks? And again, I'm not asking --

25 A No.

1 Q -- for the contents, just yes/no. No?

2 A No.

3 MR. O'LOUGHLIN: Okay. Thank you, Mr. Searles. I
4 have no more questions for you.

5 THE COURT: All right. Thank you, sir.

6 Did we lose -- ah, okay. Got it.

7 Good afternoon.

8 MR. GOLDMAN: Brian Goldman of Holwell Shuster &
9 Goldberg for the LCM parties.

10 CROSS-EXAMINATION

11 BY MR. GOLDMAN:

12 Q Good afternoon, Mr. Searles. Good to see you again. I
13 represent the --

14 A Good afternoon.

15 Q -- LCM lenders in this case and I just have a few
16 questions for you.

17 Do you have any recollection of the LCM entities being
18 invited to participate in the June 2020 transaction?

19 A No.

20 Q Do you recall ever reaching out to LCM regarding
21 possibly participating in the Barings proposed IPCO
22 transaction?

23 A No.

24 Q And you're aware that the 2016 first lien credit
25 agreement was amended in order to effectuate generally

1 speaking the June 2020 transaction?

2 A I'm sorry, can you repeat that?

3 Q Generally speaking you're aware that the 2016 1-L
4 credit agreement was amended in order to effectuate the
5 June 2020 transaction?

6 A I'd have to refresh myself on if there were amendments
7 because frankly I actually don't know or recall if there
8 were.

9 Q You don't recall whether or not the 2016 1-L credit
10 agreement was amended in order to permit the June 2020
11 transaction?

12 A No.

13 Q Pre-Serta did you ever -- did you ever participate in a
14 priming facility combined with a debt exchange at a
15 discount?

16 A I would say, yes, that's pretty common in the high
17 yield bond world and we would have been involved in some of
18 that.

19 Q And what the --

20 A And again, exact -- any exact direct correlation in
21 terms of the exact fact and circumstances, I don't know, but
22 directionally this type of transaction we looked on in high
23 yield bonds.

24 Q So just I'm clear on the answer --

25 A Yeah.

1 Q -- to the question, pre-Serta, specifically with these
2 components, did you ever participate in a priming facility
3 that was also combined with a debt exchange at a discount?

4 A I do believe so, yes, but when you say I think the
5 opening was something around specifically more specific to
6 it, an exact transaction like this, though.

7 Q All right.

8 A Again, I'll say generally speaking, yes.

9 Q You have no more specifics to offer on the deals you
10 have in mind?

11 A I don't believe you asked me specifically about deals,
12 but I'm happy to give you a sense of some that we have done.
13 Murray Energy we were involved with, Cineworld to a certain
14 extent was somewhat similar in a number of different
15 instances that was [indiscernible 3:31:36] world. In a high
16 yield world I think we've done a couple of -- Apollo had one
17 that was a 1-1/8 lien I believe at one point. Now again,
18 different transactions, different circumstances, but there
19 were serial exchanges, some involved new money, some didn't.

20 Q Okay. Thank you.

21 MR. GOLDMAN: No further questions.

22 THE COURT: All right. Thank you.

23 Mr. Millar?

24 CROSS-EXAMINATION

25 BY MR. MILLAR:

1 Q Good afternoon, Mr. Searles. I'm Jim Millar from
2 Faegre Drinker on behalf of Citadel.

3 How are you? Can you hear me okay?

4 A Doing well, thank you.

5 Q Thank you.

6 Mr. Searles, I believe you testified on direct that if
7 the plan did not include the indemnity for the 2020
8 transaction, you would vote no. Is that right?

9 A Yes.

10 Q So if it was the exact same plan without the indemnity,
11 you're going to vote no.

12 A Yes.

13 Q So what you're telling the Court is you will prevent
14 the restructuring of Serta on terms you otherwise find
15 acceptable unless you get the indemnity. Is that right?

16 A I wish we were that powerful, I don't think we have the
17 power to prevent the restructuring of Serta.

18 Q You will vote no --

19 A That would be nice.

20 (Laughter.)

21 BY MR. MILLAR:

22 Q Right. But you understand that you could be part of a
23 blocking position. Is that correct?

24 A I understand what -- if we voted no, what that means
25 for -- in terms of our voting percentage.

1 Q And that there could be a blocking position. Correct?

2 A I can only speak for Barings.

3 Q And Barings will vote no on the restructuring of Serta
4 on terms that you otherwise find acceptable unless you get
5 your indemnity. Is that right?

6 A I'm not so sure on terms we otherwise find acceptable.
7 There's a holistic package that we voted in favor of. If
8 that holistic package excludes the indemnity, we would vote
9 no.

10 Q So if it was the exact same plan without the indemnity,
11 you're voting no?

12 A Yes.

13 Q So the indemnity must be really, really important to
14 Barings. Correct?

15 A If you change any single element of a transaction, then
16 different circumstances and calculations are taken into
17 effect.

18 Q Is the indemnity really important to Barings?

19 A That's no different than you telling me -- that's no
20 different than you telling me that if you change or haircut
21 the equity percentage we're going to get without any context
22 to it, that it's a minor change or something that shouldn't
23 alter our vote.

24 Q Is the indemnity really important to Barings?

25 A Yes.

1 Q You understand that the FLSO and FLFO debt trades in
2 the market. Yes?

3 A Yes.

4 Q And you understand that a 2020 participant in the
5 transaction can therefore trade out of the FLSO and FLFO
6 debt. Correct?

7 A Yes.

8 Q And if they trade out, they would still get an
9 indemnity from the Reorganized Debtors. Correct?

10 A Again, the specifics of that indemnity and exactly how
11 that works through, that would make sense to me, yes, but
12 I'm not qualified to go into the specifics of how that
13 indemnity works.

14 MR. MILLAR: Thank you very much, Mr. Searles.

15 THE COURT: All right. Thank you.

16 Anyone else?

17 (No audible response.)

18 THE COURT: All right. Any Redirect?

19 MS. WALLEN: Just a few questions, Your Honor.

20 THE COURT: Certainly.

21 MS. WALLEN: Could we give the control back to
22 Mr. Herndon? I see you're --

23 THE COURT: One step --

24 MS. WALLEN: -- one step ahead of me.

25 THE COURT: -- ahead of you.

1 MS. WALLEN: Excellent. Thank you, Your Honor.

2 THE COURT: For once today.

3 REDIRECT EXAMINATION

4 BY MS. WALLEN:

5 Q Mr. Searles, Mr. O'Loughlin asked you about
6 Exhibit 210, which it at Docket Number 865-3.

7 MS. WALLEN: If we could bring that up, please,
8 Mr. Herndon?

9 BY MS. WALLEN:

10 Q And he asked you about a number of statements, but the
11 one I'd like to go back to is in Mr. Stewart's email where
12 he says, The new structure will amend the pro rata provision
13 at OPCO. If we could focus on that, please? In the second
14 paragraph there.

15 Okay. Mr. Searles, on June 5 when Mr. Stewart wrote
16 this had Barings seen the documents that were ultimately
17 entered into to effectuate the transaction?

18 A No.

19 Q Had Barings seen anything more than the 1-page term
20 sheet that you said Evercore sent to you?

21 A No.

22 Q Let's take a look at that term sheet.

23 MS. WALLEN: Could we bring up Docket No. 864-49,
24 which is Debtor's Exhibit 206?

25 BY MS. WALLEN:

1 Q Mr. Searles, is this a June 5, 2020 email from Ankit
2 Dalal at Evercore to you and others at Evercore?

3 A Yes.

4 Q And does this email attach the 1-page term sheet that
5 you received from Evercore on June 5?

6 A Yes.

7 Q Can you look at that term sheet and tell me, does it
8 say anything about an amendment to the pro rata provision?

9 A It does not.

10 Q Do you know what Mr. Stewart was talking about there?

11 A No.

12 MS. WALLEN: I'd like to move Docket No. 864-49,
13 Debtor's Exhibit 206, into evidence.

14 THE COURT: Any objection?

15 MR. SCHROCK: No objection.

16 THE COURT: It's admitted.

17 (Exhibit 206, ECF 864-49, received in evidence.)

18 MS. WALLEN: Thank you, Mr. Searles. I have no
19 further questions.

20 THE COURT: All right. Thank you.

21 And any limited Recross?

22 MR. O'LOUGHLIN: No, Your Honor.

23 THE COURT: All right. Thank you.

24 Mr. Herndon, or, I'm sorry, Mr. Millar.

25 MR. MILLAR: No, thank you, Your Honor.

1 THE COURT: All right. Thank you.

2 Any reason that Mr. Searles cannot be excused?

3 (No audible response.)

4 THE COURT: All right. Mr. Searles, thank you for
5 your time this afternoon. You've been very helpful. You
6 are excused from the Rule which means you're free to watch
7 if you wish, you are also free to get back to what I'm sure
8 is an otherwise interesting day.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Thank you, sir.

11 (Witness excused.)

12 MS. WALLEN: Your Honor, if we could have another
13 short recess? Our next witness is also testifying
14 remotely.

15 THE COURT: All right.

16 MS. WALLEN: So just to --

17 THE COURT: Who's the --

18 MS. WALLEN: -- allow him to connect.

19 Davis Meiering from Credit Suisse Asset
20 Management.

21 THE COURT: So that's -- all right. Do you want
22 to just take until 3:50? Does that work?

23 MS. WALLEN: Sure. Thank you --

24 THE COURT: All right.

25 MS. WALLEN: -- Your Honor.

1 THE COURT: All right. Thank you. We'll be
2 adjourned until 3:50.

3 THE CLERK: All rise.

4 (Recess taken from 3:39 p.m. to 3:53 p.m.)

5 AFTER RECESS

6 THE COURT: We are back on the Record in Case
7 No. 23-90020, Simmons Serta's Bedding (sic), LLC, et al.

8 All right. And we have our next witness?

9 MR. NADLER: Yes, Your Honor. Michael Nadler from
10 Gibson Dunn on behalf of the PTL Lenders and the additional
11 counterclaim Defendants.

12 Our next witness is Mr. Davis Meiering.

13 THE COURT: All right. Thank you, sir.

14 Good afternoon. Could you just confirm for me
15 that you can hear me?

16 MR. MEIERING: Yes, I can.

17 THE COURT: All right, thank you. If you would,
18 please, sir, if you'd raise your right hand?

19 DAVIS MEIERING, PTL LENDERS' WITNESS, SWORN

20 THE COURT: All right, thank you, sir.

21 Let me make sure I got your tech all right. So
22 he's exactly where he should be, all right? You're ready.

23 MR. NADLER: All right. Mr. Meiering, before we
24 begin, is there anyone else in the room with you at this
25 time?

1 THE WITNESS: Yes, Jennifer Huffman, Credit
2 Suisse's internal litigation counsel.

3 MR. NADLER: All right. And, Mr. Meiering, I
4 would just ask if you could not communicate with Ms. Huffman
5 about the substance of your testimony while you're on the
6 stand.

7 DIRECT EXAMINATION

8 BY MR. NADLER:

9 Q Mr. Meiering, have you observed any of the trial prior
10 to testifying today?

11 A No.

12 Q And where are you employed, sir?

13 A Credit Suisse Asset Management.

14 Q Is that sometimes referred to as "CSAM"?

15 A Yes.

16 Q And how long have you worked at CSAM?

17 A I started fulltime in February 2016, and I did an
18 internship from October 2014 to December 2015, so just over
19 eight years.

20 Q What is your title there?

21 A My corporate title is vice president. And within my
22 group, my functional title is credit and special situations
23 analyst.

24 Q And in 2020 what were your job responsibilities at
25 CSAM?

1 A I covered part of the technology sector in the credit
2 industry. And then I also did special situations and
3 restructuring, so anything from distressed secondary
4 investing to, you know, bankruptcy and workout activities.

5 Q And how many loan transactions or investments would you
6 say you've worked on in your career?

7 A I mean, I don't really keep count. But if we're
8 including, you know, new issue, restructurings, everything,
9 it's got to be well north of a hundred.

10 Q Okay. Mr. Meiering, are you familiar with Serta
11 Simmons Bedding?

12 A I am.

13 Q And did there come a time in your career at CSAM when
14 you began covering Serta?

15 A I've picked up formal coverage in 2019 when the former
16 senior analyst left this firm. But I also had a brief
17 period of time in 2016 when that same analyst was on leave
18 and I covered it temporarily.

19 Q And are you aware of how long CSAM has invested in debt
20 issued by Serta?

21 A The current structure, you know the loan issued in
22 2016, I believe are involving dates all the way back to the
23 original issue. I think we were also involved in
24 predecessor entities, but I don't know how much further it
25 goes back than that.

1 Q And in 2016 are you aware of how much of Serta's debt
2 CSAM purchased at that time?

3 A I don't have the exact number off the top of my head,
4 but it's significant. I think likely north of a hundred
5 million.

6 Q And did CSAM continue to hold onto some amount of those
7 loans through 2020?

8 A Yes.

9 Q And did there come a time when you began to coordinate
10 in some way with other of Serta's term loan holders?

11 A Yes. It was kind of around early 2020.

12 Q And why did you do that?

13 A Well, I mean, the business performance had been, you
14 know, difficult for some time. And the loans traded at
15 discounts, I think. And then COVID started to happen and we
16 had some concerns about, you know, the industry and the
17 business. And so, you know, we just wanted to be ready and
18 organized if the company needed something and we'd have an
19 organized group to respond.

20 Q And at that point did you have any particular
21 transaction or proposal in mind to offer Serta?

22 A No. I mean, at that point we didn't even know what
23 they would need, so nothing in particular.

24 Q And did there come a time when CSAM did approach Serta
25 with an idea?

1 A Yes. As part of the lender group in April of 2020, we
2 sent a kind of high-level strawman term sheet for liquidity
3 financing of the company.

4 Q Why did CSAM do that?

5 A Well, I mean, like I mentioned earlier, we suspected
6 that the industry would be difficult with COVID going on.
7 And if the company ran into a liquidity need, we wanted them
8 to know that we were, you know, potentially willing
9 providers.

10 Q At that time did you have any understanding as to
11 whether Serta was having discussions with other term loan
12 lenders or other sources of possible liquidity?

13 A At that time we didn't know for sure. I mean, we
14 hadn't seen -- I don't think we'd seen a term sheet or
15 anything like that. But we had been hearing rumors in the
16 marketplace that there were, you know, other groups or other
17 lenders sending proposals to the company. We heard rumors.

18 Q And do you recall if those rumors suggested anything
19 about what other proposals might be on the table for Serta?

20 A I mean, look, high-level most of the rumors suggested
21 at the very least aggressive. I think, you know, we came to
22 understand that it might be a dropdown IPCO-type transaction
23 over time.

24 Q And you mentioned making a new money proposal to Serta
25 in April 2020. Did that get any traction with the company?

1 A Not really.

2 Q And did there come a time when Serta did eventually
3 engage with CSAM?

4 A Yeah. We entered into NDA in May of 2020 and they
5 shared, you know, quite a bit of, you know, diligent
6 financial performance information and began negotiating with
7 us. You know, we went through a lengthy negotiation and
8 ultimately arrived at the transaction that we're in now.

9 Q And when CSAM entered into an NDA and began those
10 negotiations, at that time did you have a sense of -- or do
11 you have any understanding of whether Serta was having --
12 was engaged in negotiations with other lenders, as well?

13 A I mean, again, I don't think we know for sure. But,
14 you know, the more rumors we hear, the more certain we start
15 to feel. And we were pretty confident that there was
16 something going on at that time.

17 Q And what happened after CSAM signed an NDA with Serta?

18 A Well, after we signed an NDA, we received information,
19 you know, Centerview reviewed the business plan, you know,
20 normal kind of restructuring negotiation, although we traded
21 a few term sheets, I don't remember exactly how many, and
22 then ultimately arrived at this deal.

23 Q And what do you recall about the group's negotiations
24 with Serta? How would you describe the tenor of those
25 discussions?

1 A They were pretty typical in my mind as far as
2 restructuring negotiations go. I don't remember how many
3 rounds, like I said, but, you know, we did several rounds.
4 And so both sides were pretty firm in their positioning.
5 You know, didn't seem terribly unusual.

6 Q And during the course of those negotiations, did you
7 ever attempt to quantify the possible impact on CSAM if
8 Serta went with what you referred to earlier as a dropdown
9 transaction with some other group of lenders?

10 A Yeah, we did.

11 Q And what do you recall about that analysis?

12 A It was at, you know, relatively high level, but
13 basically sensitized a range of potential enterprise value
14 that the company might end up at and analyzed, you know,
15 what kind of recovery a lender who's left out of an IPCO
16 dropdown transaction would have, you know, assuming a
17 certain amount of value is moved out of your collateral, and
18 when you recover, you know, based upon that enterprise
19 value.

20 Q And based on your analysis, what was your view as to
21 what the worst case for CSAM might be if Serta entered into
22 a dropdown transaction with some other group of lenders?

23 A I mean, realistically we considered our worse case
24 potentially to be a zero recovery. I think the like the
25 case of the analysis probably set out like a few cents,

1 single digit percentage recovery, but a very bad one.

2 Q And at that point do you recall roughly the size of
3 CSAM's investment in Serta term loans?

4 A I don't remember exactly, but it was north of
5 200 million, maybe even close to 300 par value.

6 Q And did there come a time when you learned the details
7 of any alternative proposals that Serta had been
8 considering?

9 A Yes, at least one. The Apollo, Angelo, Gamut proposal
10 was posted to, I think it was the lender's site, so we saw
11 it eventually in the end.

12 Q And how -- once you saw the details of that proposal,
13 how close to the mark was your analysis?

14 A I mean, look, it wasn't perfect, but it was pretty
15 close.

16 Q And so how bad would it have been for CSAM if Serta had
17 engaged in the transaction it was negotiating with the
18 Apollo, Angelo Gordon, Gamut Group?

19 A I mean, at the very least it would have very, very
20 significantly elevated the amount of risk we were exposed to
21 and potentially could have lost, you know, over \$200 million
22 of par value.

23 Q What was your reaction upon learning that Serta had
24 accepted the proposal put on the table by the group CSAM was
25 a part of?

1 A Sorry, could you repeat that question?

2 Q Sure. What was your reaction when you learned that
3 Serta had accepted the proposal that CSAM and others were
4 offering?

5 A I mean, I don't really remember exactly how I reacted,
6 but I imagine we would have been relieved that we weren't,
7 you know, being exposed to the kind of risk that would have,
8 you know, accompanied their proposal.

9 MR. NADLER: The court reporter asked if you could
10 please repeat that?

11 THE WITNESS: Sure.

12 BY MR. NADLER:

13 Q The court reporter asked if you could please repeat
14 that. We didn't quite get it in the courtroom.

15 A Oh, apologies. I think I said something along the
16 lines of I don't remember exactly how I reacted at that
17 moment, but I imagine I would have been, you know, relieved
18 that we weren't, you know, left in the Apollo, Angelo
19 proposal exposed to the kind of risk that was mentioned.

20 Q Now, the Defendants in this case have argued that the
21 2020 transaction that Serta did engage in was, quote,
22 "Unprecedented and contrary to the expectations of the
23 markets and the parties."

24 What's your reaction to that?

25 A I mean, I find that a bit surprising and contrary to

1 the expectation of the parties because from an economic
2 perspective, their proposal had a lot of similarities.

3 You know, from the market broadly, look, I mean, you
4 don't see these types of transactions every day. And, you
5 know, maybe there are some nuances to this one. But similar
6 types of, you know, transactions that have similar economic
7 features have certainly occurred. So I don't think it
8 should have been unexpected.

9 Q You said that you viewed their proposal and your
10 proposal as similar in some ways. What do you mean by that?
11 What were the similarities in your view?

12 A I mean, at a high level, you're providing new
13 liquidities financing in a priority position. You're moving
14 existing claims into a new priority position at a discount.
15 And the company is, you know, getting some level of par
16 value reduction on their debt.

17 Q Mr. Meiering, when you were involved in negotiations
18 for this transaction, did you believe yourself to be
19 negotiating in good faith?

20 A Yes.

21 Q In your view were those negotiations undertaken at
22 arm's-length?

23 A Yes.

24 Q Did you ever have a view or did you ever believe that
25 the transaction was somehow -- that your proposed

1 transaction at that time was somehow inappropriate?

2 A No.

3 Q Or that it was somehow impermissible?

4 A No.

5 Q Did you ever have a view or a belief that the
6 transaction you were proposing was somehow inconsistent with
7 industry norms or expectations?

8 A I mean, kind of like I alluded to a moment ago, this
9 doesn't happen every day. But I don't think it was
10 inconsistent with what we've seen prior and what you might
11 expect.

12 Q And as part of the 2020 transaction, did you think that
13 it was important that as part of the new -- as part of the
14 priority term loan agreement in 2020 that there was an
15 indemnity provision?

16 A Yes, it's important.

17 Q Why is that?

18 A You know, my understanding of the indemnity provision,
19 a lot of it hinges on discussions with a lawyer that works
20 within CSAM and with Gibson Dunn. So I'm aware that it's
21 important and highly important to us. But the specifics of
22 why, I mean, I'm not as aware of.

23 Q Are you aware that the reorganization plan provides for
24 an indemnity for CSAM going forward if the Plan of
25 Reorganization is confirmed?

1 A I'm aware that there's a go-forward indemnity. I'm not
2 privy to how it's being implemented.

3 Q Do you understand that that go-forward indemnity to
4 also be important to CSAM?

5 A Yes, it is.

6 Q Are you aware that Citadel has made a proposal to
7 provide exit financing to the Reorganized Debtor, a
8 competing proposal?

9 A I'm aware.

10 Q And if that proposal had the effect of removing the
11 go-forward indemnity for CSAM and the other priority term
12 lenders following confirmation of the plan, would you view
13 that as adverse to CSAM's interests?

14 A Yes, we would.

15 Q And would CSAM support a Plan of Reorganization if it
16 did not indemnify CSAM on a going forward basis?

17 A We would not.

18 MR. NADLER: Thank you. I have nothing further at
19 this time.

20 THE COURT: All right. Thank you.

21 Anyone else that supports confirmation have
22 questions?

23 (No audible response.)

24 THE COURT: All right, who's taking the lead with
25 the other group?

1 Ah, all right. Could I get you to flip on your
2 screen again?

3 MR. SPEAKER: Yes.

4 THE COURT: Thank you.

5 I got you, thank you. Oops, I did not get you, my
6 apologies.

7 MS. ALBOM: Good afternoon, Mr. Meiering. My name
8 is Blair Albom and I'm here representing the Defendants and
9 Counterclaim Plaintiffs.

10 CROSS-EXAMINATION

11 BY MS. ALBOM:

12 Q You testified on Direct that you had heard rumors that
13 some other group or groups of lenders were proposing a
14 potential dropdown transaction, correct?

15 A That's right.

16 Q And you didn't know the identity of those other lenders
17 at the time you heard those rumors, correct?

18 A I don't think we knew the identity and specifics for a
19 fact, but we -- you know, we had over time, you know, come
20 to know who it might be, had a, you know, assumption.

21 Q But at the time that -- well, but my -- you didn't know
22 who the identity of those other lenders were at the time you
23 heard those rumors, correct?

24 A That's right.

25 Q And in fact, you didn't learn their identities until

1 their proposal became -- well, eventually you came to learn
2 that one of those lender groups included Angelo Gordon,
3 Gamut, and Apollo, correct?

4 A Yeah, eventually we came to learn that.

5 Q Okay. And you didn't learn their identities until
6 their proposal became publicly available, correct?

7 A I don't remember exactly when we learned their
8 identities. That might have been when we knew it for fact.
9 But before then we had a sense that it was them.

10 Q Well let me -- do you recall giving a deposition in
11 this case, Mr. Meiering?

12 A I do.

13 Q Okay. And do you have a copy of your deposition
14 transcript in front of you?

15 A I think it might be in one of these binders here.

16 Q Okay.

17 A Yes, I do.

18 Q We're also going to put it on the screen as well.

19 A Okay.

20 Q And let me direct your attention to page 110, line 19.
21 And you were asked the following questions and gave the
22 following answers:

23 "QUESTION: Were there any other lenders that you knew
24 to be negotiating alternative proposals with the company,
25 other than Apollo?

1 "ANSWER: I think that the rumors that we heard from
2 about these proposals were limited to one group. If we
3 learned of more later, it would have come from counsel.

4 "QUESTION: And when you say limited to one group, you
5 mean the Apollo group?

6 "ANSWER: Like I said earlier, at the time I didn't
7 know who was in it. We learned of the other side's proposal
8 when it was cleansed on the lender's side." Site, excuse
9 me.

10 Did I read that correctly?

11 MR. NADLER: Objection, improper impeachment.

12 THE COURT: Any response?

13 MS. ALBOM: Well, he said that he thought that
14 they -- that maybe they knew who -- which of the lenders
15 were within that group. And he had testified at his
16 deposition that they didn't know who was in it at the time
17 that they heard the rumors.

18 THE COURT: He didn't know specifically. Yeah, I
19 agree. I don't think that that is an appropriate use of a
20 depo for impeachment. I'll sustain the objection.

21 MS. ALBOM: I'll move on.

22 BY MS. ALBOM:

23 Q Moving to another topic, Mr. Meiering, CSAM was part of
24 the Ad Hoc Group represented by Gibson Dunn in the 2020
25 transaction, correct?

1 A Yes.

2 Q And in addition to the Ad Hoc Group, certain other of
3 Serta's first and second lien lenders participated in the
4 2020 transaction, correct?

5 A Yes.

6 Q CSAM was not involved in deciding which of Serta's
7 lenders outside the Ad Hoc Group participated in the 2020
8 transaction, correct?

9 A That's correct.

10 Q And CSAM didn't advocate for certain lenders to be
11 included in the 2020 transaction, right?

12 A Not that I know of.

13 Q And CSAM didn't advocate for certain lenders to be
14 excluded from the 2020 transaction, right?

15 A Not that I know of.

16 Q I want to show you what's been filed as Defendants'
17 Exhibit 175, which was filed at adversary proceeding ECF
18 No. 250-82.

19 Do you have that in front of you?

20 A Yeah, one moment.

21 (Pause in the proceedings.)

22 A You know, I can see it on the screen.

23 Q Okay.

24 A We'll go from there.

25 Q Okay. Is this a Bloomberg instant message conversation

1 that you participated in on June 5th, 2020?

2 A That's right.

3 MS. ALBOM: Okay. Your Honor, I'd like to move
4 this exhibit into evidence.

5 THE COURT: Any objection?

6 MR. NADLER: No objection, Your Honor.

7 THE COURT: All right, it's admitted.

8 (Exhibit 175, ECF 250-82, received in evidence.)

9 BY MS. ALBOM:

10 Q Go with me, if you will, to the second page of this
11 document, which is the Bates stamp ending 458607 on the
12 bottom.

13 Go with me to the -- I guess it's the third line from
14 the bottom. "D. Meiering," that's you, right?

15 A That's right.

16 Q And D. Mechlin is David Mechlin, a portfolio manager at
17 CSAM.

18 A That's right.

19 Q You write, "Advent earmarked Barings, Oaktree, and TPG
20 to fill the gap."

21 And Mr. Mechlin replies, "The last ten percent?"

22 And then going on to the next page, you reply, "Yeah."

23 And then 11 lines down from that you say, "And Angelo,
24 Apollo, Gamut are being left out."

25 Do you see that?

1 A Yeah, I see that.

2 Q When you wrote "Advent earmarked Barings, Oaktree, and
3 TPG to fill the gap," by "fill the gap," you meant reach the
4 participation threshold in the term sheet, correct?

5 A I don't really remember sending this message.

6 Q Do you recall that I asked you about this message in
7 your -- at your deposition?

8 A (No audible response.)

9 Q Let's just go to page 208, line 24.

10 And let me just ask you to be clear, putting aside that
11 you don't recall writing this message, when you wrote,
12 "Advent earmarked Barings, Oaktree, and TPG to fill the
13 gap," by "fill the gap," you meant CSAM -- you meant reach
14 the participation threshold in the term sheet, correct?

15 A I mean, I just don't really remember sending the
16 message. It's been a long time.

17 Q Okay. But that's not what I asked you. I'm asking you
18 when you wrote, "Advent earmarked Barings, Oaktree, and TPG
19 to fill the gap" by "fill the gap" you meant reach the
20 participation threshold in the term sheet, correct?

21 A I mean, that might have been what I meant. But I don't
22 remember sending the message, so it's tough to confirm that
23 now.

24 Q Well, do you remember that I -- let's go to page 208
25 and line 24 of your deposition. And at that time when I

1 asked you, "Question, what did you mean that Advent
2 earmarked Barings, Oaktree, TPG to fill the gap?"

3 You answered, "By earmarked, I mean tentatively
4 selected. And to fill the gap was to reach the
5 participation threshold in the term sheet."

6 Did I read that correctly?

7 A Yes.

8 THE COURT: And does that refresh your memory as
9 to why you said that?

10 BY MS. ALBOM:

11 Q And does that refresh your memory as to why you said
12 that?

13 A Earmarked makes sense. Fill the gap, you know, I guess
14 it kind of makes sense, too. So, yeah, I suppose.

15 Q I want to show you Defendants' Exhibit 255, which was
16 filed at adversary proceeding ECF Number 252-56.

17 And let -- before we actually do that, let me just ask
18 you something. We were just talking a minute ago about
19 reaching the participation threshold. That threshold was
20 50.1 percent, correct?

21 A I believe that was the number that we ultimately landed
22 on, --

23 Q Okay.

24 A -- yes.

25 Q All right. Now I would like to show you Defendants'

1 Exhibit DX-255, which was filed at adversary proceeding ECF
2 No. 252-56.

3 Do you have that in front of you?

4 A I'm searching for it, but I can also see it on the
5 screen.

6 Q Okay. Is this a Bloomberg instant message conversation
7 that you participated in on June 11, 2020?

8 A Yes.

9 Q Go with me to the first page of this document where the
10 conversation begins, and you write, "Two things on Serta" --
11 this is sort of three-quarters of the way down the page.

12 "Two things on Serta. Advent already used or earmarked
13 all of the exchange capacity except 10 million. And do you
14 guys want to extend a helping hand to those smaller managers
15 by giving 10 million more room?"

16 Now go with me to the fourth page of this document,
17 towards the top. And you write, "I'm personally
18 uncomfortable with the concept of picking and choosing.
19 Advisors have a list of like five institutions that have
20 reached out, guys like New York Life, Marathon, SVP, and
21 El Sentra (phonetic). We can't include everyone. That's
22 not the deal. Advent is deciding."

23 Do you see that? Did I read that correctly?

24 A I see.

25 Q Okay. And by "Advent is deciding," you meant Advent is

1 deciding which lenders were able to participate in the deal,
2 correct?

3 A Look, I mean, I don't really remember sending that
4 message. I may have thought that had been the case at the
5 time. But I don't know how I could have possibly known
6 that.

7 (Pause)

8 MS. ALBOM: I'd like to admit this document into
9 evidence.

10 THE COURT: Any objection?

11 MR. NADLER: No objection, Your Honor.

12 THE COURT: All right, it's admitted.

13 (Exhibit DX-255, ECF 252-56, received in evidence.)

14 MS. ALBOM: I also asked you about this document
15 at your deposition. If you go to page 222, line six.

16 THE COURT: So let me ask a question.

17 Mr. Meiering, you don't dispute that these are
18 your messages, do you?

19 THE WITNESS: No. Those are my messages.

20 THE COURT: All right. So you said what you said.

21 MS. ALBOM: Okay. I'll move on.

22 THE COURT: You don't have to move on. But
23 sometimes I'm not very smart so a lot -- most of the time I
24 take the easy way out. You know, if he didn't -- if he
25 can't run from them, then they're his statements.

1 BY MS. ALBOM:

2 Q Well, you acknowledged at your deposition that that is
3 what you meant; is that right, Mr. Meiering?

4 A Could you -- just to clarify refer to where that is in
5 the transcript?

6 Q Yeah. At page 222, line six, I had asked you:

7 "QUESTION: You said Advent is deciding. Did you mean
8 Advent is deciding which lenders were able to participate in
9 the deal?

10 "ANSWER: So where is this?

11 "QUESTION: This is the Bates ending 659 towards the
12 top.

13 "ANSWER: I don't remember writing this specific
14 message, but it does seem that that's what I meant."

15 Do you recall telling me that at your -- answering that
16 question at your deposition?

17 A I recall answering that, yes. But I also recall
18 towards the end of the deposition I was asked whether or not
19 I could have known. And I don't -- I think I answered
20 something --

21 Q Wait, --

22 A -- along the lines of I don't know how I --

23 Q -- Mr. Meiering, --

24 A -- could have known.

25 Q Mr. Meiering, I --

1 A Those are my words.

2 Q Mr. Meiering, I just asked you a simple question, which
3 is whether that was the answer that you gave at your
4 deposition, and it's a yes or a no. And I believe you
5 answered --

6 A That is the answer, yeah.

7 Q -- the question "yes."

8 Okay. You can put that aside. You're aware that as
9 part of the 2020 transaction Serta indemnified the lenders
10 who participated in the 2020 transaction, correct?

11 A Yes.

12 Q And that indemnity was contained in a provision in one
13 of the agreements memorializing the 2020 transaction,
14 correct?

15 A Yes.

16 Q And you don't believe that CSAM negotiated that
17 provision directly with Serta, right?

18 A I don't remember how exactly it was negotiated. I
19 imagine it would have been through Gibson Dunn and highly
20 advised by them.

21 Q At the time that that provision was being negotiated,
22 you didn't know what terms were being negotiated, correct?

23 (Pause in the proceedings.)

24 A I'm a bit confused by the question. The time the
25 indemnity was being negotiated, we knew some of the terms of

1 the deal, --

2 Q Well, I'm asking --

3 A -- are you referring to the specific terms within the
4 indemnity?

5 Q Yes, that's correct.

6 A Well, for this type of provision we heavily rely on the
7 advice of counsel. So, you know, I can't remember if we
8 were aware of specific terms but it would have all been in
9 discussion with them. It would have been -- that type of
10 understanding would have been privileged I think.

11 Q Okay. So anything you know about the negotiation of
12 the indemnity provision you know through conversations with
13 counsel, correct?

14 A That's right.

15 Q But you don't know, in fact, whether this provision was
16 the subject of negotiations between your counsel and Serta's
17 counsel, correct?

18 A I mean, I know it was negotiated, that's for sure; just
19 the details I don't have handy.

20 Q Were you personally involved in those negotiations?

21 A I don't remember.

22 Q And your understanding of the indemnity provision is
23 based solely on the advice of counsel; is that right?

24 A That's right.

25 Q In 2020 you maintained a financial model that analyzed,

1 among other things, Serta's ability to service its debt
2 obligations; is that right?

3 A Yeah, that's right.

4 Q You updated that model quarterly and perhaps even more
5 often, correct?

6 A Correct.

7 Q As of June 4, 2020 CSAM had not reached a conclusion
8 that Serta would be unable to meet its obligations to its
9 first lien loan holders under the 2016 credit agreement,
10 correct?

11 A I wouldn't say that we reached a conclusion.

12 MS. ALBOM: Okay. Thank you.

13 I have no further questions.

14 THE COURT: All right. Thank you.

15 (Pause in the proceedings.)

16 MR. GOLDMAN: Brian Goldman of Holwell, Shuster,
17 and Goldberg for the LCM parties.

18 Good afternoon, Mr. Meiering. I represent the LCM
19 lenders in this case and have just a few short questions for
20 you.

21 CROSS-EXAMINATION

22 BY MR. GOLDMAN:

23 Q Do you have any recollection of whether the LCM lenders
24 were invited to participate in the June 2020 transaction?

25 A I don't know if they were or not.

1 Q Sorry. So you don't know whether you have a
2 recollection?

3 A I don't know if they were invited or not.

4 Q You don't recall them ever being invited to
5 participate; is that accurate?

6 A I wouldn't phrase it that way.

7 Q How would you phrase it?

8 A I don't know whether or not they were invited to
9 participate.

10 THE COURT: So ask him the question that he has
11 personal knowledge of.

12 MR. GOLDMAN: Do you have -- thank you.

13 BY MR. GOLDMAN:

14 Q Do you have personal knowledge of whether the LCM
15 entities were ever invited to participate in the June 2020
16 transaction?

17 A No.

18 Q Okay, thank you.

19 Do you have any personal knowledge of whether the LCM
20 entities were ever invited to participate in any alternative
21 transaction that Serta proposed?

22 A No.

23 Q Okay. And are you aware that the first lien creditor
24 agreement was amended in order to effectuate the June 2020
25 transaction?

1 A I'm aware.

2 Q And do you have personal knowledge of ever considering
3 voting for those amendments without participating in the
4 debt exchange?

5 (Pause in the proceedings.)

6 A We evaluate on a fund-by-fund basis whether or not we
7 vote for an amendment. So, I mean, we considered it. I'm
8 not sure if we considered that in that exact way, but again.

9 MR. GOLDMAN: Okay. No further questions.

10 THE COURT: All right, thank you.

11 Mr. Millar.

12 MR. MILLAR: Good afternoon. I'm James Millar,
13 Faegre Drinker, on behalf of Citadel. Just a couple
14 questions.

15 CROSS-EXAMINATION

16 BY MR. MILLAR:

17 Q By way of recap from your direct testimony, I believe
18 you testified that the indemnity in the PTL agreement is
19 important; is that right?

20 A That's right.

21 Q And you testified the indemnity in the exit financing
22 is important, yes?

23 A I'm not sure how the ongoing indemnity is being
24 implemented, but the indemnity is important.

25 Q Okay. But you testified that you don't know why.

1 MR. NADLER: Objection, that mischaracterizes his
2 testimony, Your Honor.

3 MR. MILLAR: It's what he said, Your --

4 THE COURT: It's the --

5 MR. MILLAR: -- Honor, candidly.

6 THE COURT: -- substance of it. It's not exactly
7 what it says. It's the collusion -- it's the conclusion you
8 come to when you listen to his answer.

9 MR. NADLER: Your Honor, I --

10 THE COURT: So why don't you just re-ask him the
11 question? Because the answer that he gave was very
12 unsatisfactory, but no one pressed him. But, I mean, if you
13 want to make that assumption, go ahead. But why don't you
14 just ask him?

15 MR. MILLAR: I'm not sure I'm following you, Your
16 Honor. Ask him.

17 THE COURT: No, then I'll be quiet. I --

18 MR. MILLAR: No, I --

19 THE COURT: -- so want to get up and cross-examine
20 and I'm just not allowed to do that anymore, so.

21 MR. MILLAR: Oh, no, you can. I cede the podium.

22 Well, I'm going to ask the question again.

23 BY MR. MILLAR:

24 Q Do you know why the indemnity -- well let me -- strike
25 that.

1 Do you know what's in the indemnity?

2 A I -- look, I'm not involved in the day-to-day on the
3 bankruptcy case now, but my colleague is. And so my
4 understanding of this is really based on a discussion I had
5 with him at Gibson Dunn yesterday. I mean, I know it's
6 important to us, but I don't -- I've never even looked at
7 the wording of this indemnity.

8 Q So your testimony that the indemnity is important is
9 based on a discussion with Gibson Dunn.

10 A No. We -- well, Gibson Dunn wasn't involved in the
11 discussion. We looped in Michael (indiscernible), who's
12 CSAM's credit investments group's head of restructuring, and
13 he confirmed that it is important to us, very important to
14 us.

15 MR. MILLAR: Okay. Thank you.

16 THE COURT: Thank you.

17 Anyone else?

18 (No audible response.)

19 All right, any Redirect?

20 MR. NADLER: No, Your Honor. And our next witness
21 is here in person. I believe he's in the hallway. I can go
22 grab him. It's Phil Yarrow of Invesco.

23 THE COURT: All right. First, Mr. Meiering, thank
24 you for your time this afternoon. You are excused from the
25 rule. You're welcome to watch if you wish. You're also

1 free to get about your day. But I appreciate you taking
2 time out. All right?

3 THE WITNESS: Thank you.

4 THE COURT: Thank you, sir, you're excused.

5 (Witness excused.)

6 THE COURT: All right. You want to grab next
7 witness?

8 MR. NADLER: Yes, Your Honor.

9 THE COURT: All right, thank you.

10 (Pause in the proceedings.)

11 MR. NADLER: And, Your Honor, this will be our
12 last witness for the day.

13 THE COURT: Oh, okay.

14 MALE SPEAKER: That's not true.

15 MR. NADLER: Sorry, Weil may have others. The
16 Debtors may have others. This will be the last of the
17 lender witnesses.

18 THE COURT: All fine. I was having a tough time
19 believing that anyway. It's okay. All right.

20 Are you the gentleman, are you the witness?
21 Please come on up.

22 MALE SPEAKER: Our last witness, I should have
23 been clearer.

24 THE COURT: Good afternoon. Before you sit down,
25 if you could raise your right hand?

1 PHILIP YARROW, LENDER'S WITNESS, SWORN

2 THE COURT: All right, thank you.

3 Good afternoon.

4 MS. PERLOFF-GILES: Good afternoon. Alexandra
5 Perloff-Giles from Gibson Dunn & Crutcher on behalf of
6 the --

7 THE COURT: All right, sir, --

8 MS. PERLOFF-GILES: Sorry.

9 THE COURT: -- you can sit down.

10 FEMALE SPEAKER: What's your name?

11 MS. PERLOFF-GILES: Alexandra Perloff-Giles from
12 Gibson Dunn & Crutcher on behalf of the Ad Hoc Group of PTL
13 Lenders.

14 Your Honor, may I approach?

15 THE COURT: Of course. Thank you.

16 And are we doing this one just within the
17 courtroom?

18 MS. PERLOFF-GILES: Yes, just within the
19 courtroom.

20 THE COURT: Okay. Hold on, let me get that.

21 All right. You should be in good shape.

22 MS. PERLOFF-GILES: Good afternoon, Mr. Yarrow.

23 THE WITNESS: Good afternoon.

24 DIRECT EXAMINATION

25 BY MS. PERLOFF-GILES:

1 Q Before we begin, can you please confirm for the Court
2 that you did not listen to the other side's opening
3 presentations or any of the testimony of the other witnesses
4 in this case?

5 A I did not.

6 Q Thank you.

7 Where do you work?

8 A I work at Invesco.

9 Q And where did you work before that?

10 A Before that I worked at Van Kampen. And then before
11 that I worked in the banking industry at First Chicago Bank
12 One JPMorgan Chase.

13 Q And when did you start working at Invesco?

14 A I started in 2010.

15 Q And what's your current role at Invesco?

16 A So it's a split role between portfolio management and
17 on the credit side. On the credit side I'm a team leader
18 and then I also cover certain names as an analyst, as well.

19 Q And how long have you had that role at Invesco?

20 A Since 2010.

21 Q When did Invesco become party to the 2016 credit
22 agreement?

23 A We came party to it in 2016 at origination.

24 Q And who at Invesco made the recommendation to
25 participate in the 2016 transaction?

1 A I did.

2 Q And to your knowledge who drafted the 2016 credit
3 agreement?

4 A It would have been drafted between the agent, UBS, and
5 the company and the sponsor.

6 Q How would you characterize the 2016 credit agreement?

7 A I would characterize it as a loose agreement.

8 Q And what's a "loose" agreement?

9 A One that gives the company and the sponsor quite a lot
10 of flexibility as far as its terms are concerned, and in
11 particular there's quite large baskets for making
12 investments or making restricted payments or adding
13 additional debt.

14 Q Were loose credit agreements unusual in 2016?

15 A Not really. They were becoming more and more
16 prevalent. After the great financial crisis, the market
17 started to pick up. And a lot of the deals we were looking
18 at were well over-subscribed. And when you typically have
19 an over-subscribed deal, the power in the negotiation of a
20 credit agreement switches more towards the borrower. And so
21 they were able to get more and more flexible terms in their
22 credit agreements.

23 Q Does Invesco prefer to enter into tight or loose credit
24 agreements?

25 A We would definitely prefer tighter agreements.

1 Q And why is that?

2 A I mean, we come in to these transactions -- virtually
3 all the deals we do, we come in to them at origination, at
4 par. These are performing companies. And, you know, our
5 expectation is, is that they're going to continue to perform
6 and pay us back our loan with interest. So, you know, we
7 are very concerned about, you know, downside risk.

8 And when you have looser credit agreements, it's a lot
9 harder to, you know, you're taking a lot more risk that if
10 the company doesn't perform as you expect, then there's a
11 lot more chance that you could see collateral moved away
12 from you or the sponsor trying to leak money away from you.
13 So it can really hurt your recovery in a downside scenario,
14 and we're really focused on that.

15 Q So why did Invesco agree to a loose credit agreement if
16 it prefers tighter credit agreements?

17 A Well, I mean, we have funds that have cash to put to
18 work and our investors expect us to put it to work in the
19 bank loan market. And at that time most of the credit
20 agreements were generally speaking loose.

21 So if we decided not to do a deal just because of a
22 loose credit agreement, we would be doing virtually no deals
23 at that time. So, you know, we have to sort of pick and
24 choose.

25 Q So I'd like to turn now to the period leading up to the

1 2020 transaction. What was your understanding of Serta's
2 financial condition at that time?

3 A It was definitely very weak. In 2018, their major
4 customer filed for bankruptcy. And really from that time on
5 the company had been struggling from a performance
6 standpoint.

7 Q How did Invesco come to be part of the Ad Hoc Group
8 that ultimately undertook the transaction?

9 A We got invited into the Ad Hoc Group. I actually
10 forget whether it was one of the other larger lenders
11 invited us or whether they'd already talked to Gibson Dunn
12 or whether Gibson Dunn approached us.

13 But typically in these scenarios it's one of the other
14 lenders or counsel that will reach out to us and ask if we
15 want to join the group.

16 Q And when was that?

17 A It was in March of 2020.

18 Q What was the purpose of forming this Ad Hoc Group?

19 A Well, we started to get wind that the company had a
20 liquidity need. And so in those situations it's very
21 typical that the larger lenders will get together as a group
22 and hire counsel so that they can approach the company more
23 with what's one voice.

24 Q Did you have a specific transaction structure already
25 in mind at this point in time?

1 A Not initially. But we fairly quickly sort of came
2 around to the idea that the right approach, the cleanest
3 approach, would be to offer them a new money superpriority
4 facility that would be open to all lenders to fulfill their
5 liquidity need.

6 Q What other lenders did you speak to in this March time
7 period?

8 A I spoke to Credit Suisse, Eaton Vance, Barings. And I
9 did also speak to Gamut.

10 Q How did you come to speak to Gamut?

11 A They reached out to me and asked if, you know, if we
12 could have a call about it.

13 Q Who at Gamut did you speak to?

14 A Michael Krieger.

15 Q And before you spoke to Mr. Krieger, what did you think
16 his reason was for wanting to speak to you?

17 A I didn't really know that much about Gamut at the time
18 and I just assumed that they wanted to potentially join our
19 group.

20 Q Would Invesco have had any objection to Gamut joining
21 its Ad Hoc Group?

22 A No, not at all.

23 Q What did Mr. Krieger say to you when you did, in fact,
24 speak to him?

25 A He told me actually that they were forming their own

1 group and had hired counsel and asked if we were interested
2 in joining their group.

3 Q What was your reaction to learning that there was
4 another group forming?

5 A I was pretty surprised because it -- especially at that
6 time, in my experience it is -- it was pretty rare to have
7 two first lien lender groups.

8 Q Why didn't you join the Gamut group?

9 A Within our group we had a lot of like-minded lenders to
10 ourselves. And we'd worked a lot with Gibson Dunn in the
11 past, so we felt very comfortable in that group and really
12 saw no reason to change.

13 Q What do you mean by like-minded lenders?

14 A Other lenders that are typically going to come into the
15 loan at origination, as opposed to lenders that are going to
16 be more focused just on buying loans in this stressed or
17 distressed situations.

18 Q Were you concerned about there being another 1-L group?

19 A Initially I was just sort of surprised, and I thought
20 maybe it would just end up that we would sort of converge
21 into one group. But I think it -- after discussions with
22 some of the other Ad Hoc Group members it became kind of
23 clear that they were going to be putting some sort of
24 competing transaction in front of the company. And I think
25 that was definitely concerning.

1 Q I'd like to show you Debtor's Exhibit 95. That's ECF
2 No. 862-39 in the main case. It should be tab number one in
3 your binder.

4 Do you recognize this as an April 29th, 2020 email
5 between you and James Irvin?

6 A Yes, I do.

7 MS. PERLOFF-GILES: I'd like to move to admit
8 Debtor's Exhibit 95.

9 THE COURT: Any objection?

10 FEMALE SPEAKER: None, Your Honor.

11 THE COURT: Thank you.

12 It's admitted.

13 (Exhibit 95, ECF 862-39 received in evidence.)

14 MS. PERLOFF-GILES: Thank you.

15 BY MS. PERLOFF-GILES:

16 Q You can take a minute to read through the document if
17 you like, Mr. Yarrow. I'd like to ask you about the first
18 sentence of your email. You write, "Adding in the PMs
19 because this is a bit disturbing to me." What was
20 disturbing to you?

21 A Well, Jim Irvin, who's one of our traders, was
22 basically pointing out that there was a buyer of the debt
23 that day, but they were going to become restricted
24 immediately after that.

25 And so that was really what was disturbing because at

1 that point in time, we weren't really even close to coming
2 restricted. Our advisors weren't restricted. We were still
3 really trying to, you know, get on the company's radar. So
4 this sort of clearly sort of indicated that certain lenders
5 were a lot further along with discussions with the company.

6 Q Did you have any sense of what kind of transaction this
7 other group might be proposing?

8 A I mean, we -- I think we started to hear that, you
9 know, the likelihood was it was going to be some sort of
10 IPCO or dropdown-type transaction.

11 Q And why did you think that?

12 A I think it was really just because of we started to --
13 our advisors had started to talk to the Serta advisors and I
14 think that was what was being heard through the grapevine
15 was that was the deal that was likely to be put on the
16 table.

17 Q What kind of transaction, if any, was Invesco
18 envisioning in this April time period?

19 A We were still envisioning, you know, a new money
20 superpriority facility that would -- all lenders would be
21 able to participate in.

22 Q So why didn't Invesco ultimately propose a different
23 kind of transaction to Serta?

24 A Well, once we started to have discussions with the
25 company and the company's advisors, it became pretty clear

1 that in addition to their goal of raising liquidity, they
2 also saw this as an opportunity to reduce their debt. And
3 so it was clear that they were not going to entertain our
4 proposal. So if we didn't offer something else, they were
5 clearly going to go down the route of one of these dropdown-
6 type transactions.

7 Q I'd like to show you a document that has been marked as
8 Debtor's Exhibit 149, filed at ECF 863-42, which should be
9 tab number two in your binder.

10 A Yeah.

11 Q And do you recognize this as an email thread that
12 you're on from late May, 2020?

13 A I do.

14 MS. PERLOFF-GILES: I'd like to move to admit
15 Debtor's Exhibit 149.

16 FEMALE SPEAKER: No --

17 THE COURT: Any objection?

18 FEMALE SPEAKER: No objection, Your Honor.

19 THE COURT: Thank you. It's admitted.

20 (Exhibit 149, ECF 869-42, received in evidence.)

21 MS. PERLOFF-GILES: Thank you.

22 BY MS. PERLOFF-GILES:

23 Q Directing your attention to page 3 of the document, you
24 write, "Evercore is going to work on a strawman proposal."

25 Was Evercore the financial advisor to your Ad Hoc

1 Group?

2 A No. It was Centerview. I made a mistake when I was
3 drafting this memo.

4 Q What is a strawman proposal?

5 A It's basically just a proposal that sort of acts as a
6 starting point for the group to discuss.

7 Q And if we could turn now to the bottom of page two, so
8 one page back, an email from Kevin Egan. And who is
9 Mr. Egan?

10 A He's a portfolio manager and a member of the investment
11 committee at Invesco.

12 Q He writes, "Phil, I agree we -- that we have to put a
13 competitive proposal on the table. We can ill afford to
14 have that magnitude of assets, in particular the IP, dropped
15 from our borrower."

16 What did you understand Mr. Egan to mean by that?

17 A Well, he was concerned, as was I, that, you know, that
18 if we did not put a transaction on the table that would be
19 better for the company, then the company was going to choose
20 a dropdown transaction and we'd end up having a lot of our
21 collateral, including the IP, stripped away from our
22 borrower.

23 Q Why would that have been a problem from Invesco's point
24 of view?

25 A Well, I mean, clearly the collateral supporting a loan

1 is extremely important. So to have that moved away would
2 have been pretty devastating for the value of our loan.

3 Q Mr. Egan goes on to ask, "Do we know the composition of
4 that group?"

5 Did it matter to Invesco which particular lenders were
6 actually behind the competing transaction?

7 A I mean, it didn't really because as, you know, whoever
8 did the transaction, it was still going to have the same
9 impact on us.

10 But knowing that, you know, it was three hedge funds
11 that we knew were pretty aggressive obviously made us pretty
12 concerned about the type of transaction that they were
13 likely to be proposing.

14 Q And going up the chain now to page one of this
15 document, in the middle there's an email from David Lucas at
16 12:32 p.m. Who is Mr. Lucas?

17 A He's another portfolio manager and another member of
18 the investment committee at Invesco.

19 Q And he writes there at the end of the first paragraph
20 at "L" plus 550, "600 we need to be protected as that rate
21 isn't overwhelmingly attractive."

22 What did you understand him to mean by that?

23 A So I think he's talking about the new money that we
24 were putting up and the fact that we view LIBOR plus 550 to
25 600 to be below market for that type of money. So it just

1 was really important that that money was in a protected
2 position.

3 Q And he then writes, "Pricing, I agree it seems low, but
4 the risk of getting our collateral taken away puts us in the
5 position of likely having to accept something lower than we
6 otherwise would."

7 Did you think the pricing was low?

8 A I did. I think that in this type of situation, for a
9 company that was in, you know, this much financial stress
10 putting out new money, I think a market price would have
11 been higher than that.

12 MS. PERLOFF-GILES: We can take that down, thank
13 you.

14 BY MS. PERLOFF-GILES:

15 Q During the time the Ad Hoc Group of PTL Lenders was
16 negotiating with Serta did you ever see a term sheet for any
17 other proposal?

18 A I did not.

19 Q Did you know the details of the Angela Gordon, Apollo,
20 Gamut group proposal?

21 A No. We just knew sort of very high level what type of
22 transaction they were thinking about.

23 Q Would you have expected to know the details of other
24 competing proposals?

25 A No, not really. I think it would have been in the

1 company's interest to have given us, you know, the details
2 of that transaction so that we knew what the competitive
3 proposal was.

4 Q I'd like to show you a document that's been marked as
5 Defendants' Exhibit 218, please; should be the next tab.
6 And what is this document?

7 A This is a summary that I put together of the different
8 transactions shortly after we'd agreed to the transaction
9 with the company.

10 MS. PERLOFF-GILES: And I'd like to move to admit
11 Defendants' Exhibit 218.

12 THE COURT: Any objection?

13 FEMALE SPEAKER: No objection, Your Honor.

14 THE COURT: Thank you. It's admitted.

15 (Exhibit 218 received in evidence.)

16 BY MS. PERLOFF-GILES:

17 Q If we could turn to the summary document itself, to the
18 final page. You write, "If we had allowed the Gamut group
19 to complete their deal, it would have been a complete
20 disaster for us as we would have had virtually all the major
21 assets of the company stripped away from our borrower."

22 Why would that deal have been a complete disaster?

23 A Because we would have had the collateral, pretty much
24 the entirety of the collateral stripped away from our
25 borrower, as well as the fact that our borrower would have

1 had to have guaranteed that -- the debt, the unrestricted
2 subsidiary, and would have had to have made royalty payments
3 to use the IP. So the combination of these things would
4 have been very bad for the value of our term loan.

5 Q And you then write, "Our deal, which we really pursued
6 as a defensive measure to stop the Gamut deal from going
7 through, did offer Advent a lot," and continues.

8 Why did you view this as a defensive measure?

9 A Because the only reason why we put that deal in front
10 of the company was to essentially stop them from doing the
11 Gamut transaction.

12 Q I'd like to show you a document that's been marked as
13 Debtor's Exhibit 231, filed at ECF No. 865-23.

14 Do you have that? Do you recognize this document as an
15 email exchange between you and Matthew Brooks?

16 A I do.

17 MS. PERLOFF-GILES: I'd like to move to admit
18 Debtor's Exhibit 231.

19 THE COURT: Any objection?

20 FEMALE SPEAKER: No objection, Your Honor.

21 THE COURT: Thank you. It's admitted.

22 (Exhibit 231 received in evidence.)

23 MS. PERLOFF-GILES: Thank you.

24 BY MS. PERLOFF-GILES:

25 Q Who is Mr. Brooks?

1 A He's a colleague of mine in the -- in Invesco private
2 credit group.

3 Q Mr. Brooks writes, wow, would love to ask you some
4 questions about this when you have time over the next few
5 days. What did you understand him to mean by wow?

6 A I think he was expressing surprise at the outcome. You
7 know, I think, you know, in a competitive situation with
8 three hedge funds that don't typically lose in these
9 scenarios, I think there was a lot of surprise that our
10 proposal was the one that was picked.

11 MS. PERLOFF-GILES: We can take that down, thank
12 you.

13 BY MS. PERLOFF-GILES:

14 Q I'd like to switch gears and talk about the indemnity
15 now.

16 Are you aware that there's an indemnity provision in
17 the priority term loan agreement whereby the borrower
18 indemnifies the lender for losses, damages, or claims,
19 including in connection with the transaction?

20 A I am, yes.

21 Q Did Invesco want an indemnity provision in the priority
22 term loan agreement?

23 A Yes.

24 Q And why is that?

25 A Because there was already -- we were already being sued

1 and so we wanted to have some protection about this around
2 that. You know, we're obviously very much concerned about
3 our downside so we wanted to be protected.

4 Q Are indemnity provisions standard in your experience?

5 A Yes, they are.

6 Q Invesco was part of the priority lender group at the
7 time the RSA was being negotiated in this case; is that
8 right?

9 A That's right.

10 Q Was Invesco focused on whether a post-effectiveness
11 indemnity would be included in the plan while the RSA was
12 being negotiated?

13 A Yeah, yes, we were.

14 Q When Invesco signed onto the RSA was it aware that a
15 post-effectiveness indemnity was included in the plan?

16 A Yes.

17 Q And was that an important component of the plan from
18 Invesco's perspective?

19 A Yes, it was.

20 Q Would Invesco have signed the RSA if the post-
21 effectiveness indemnity was not included in the plan?

22 A No, we wouldn't.

23 Q Why not?

24 A Again, I mean, we were very concerned about our
25 downside and we were -- as part of the RSA we were

1 equitizing a substantial amount of our debt and agreeing to,
2 you know, allow the company to move through bankruptcy as
3 quickly as possible, which I think was in the interest of
4 the company. And I don't think we would have agreed to do
5 that if we hadn't some downside protection from the
6 indemnity.

7 Q Are you aware that Citadel has made a proposal to
8 provide exit financing to the Reorganized Debtor and replace
9 the takeback paper?

10 A I am.

11 Q If that proposal had the effect of removing Serta's
12 indemnity for the PTL Lender group for claims related to the
13 2020 transaction, would you view that as adverse to Invesco?

14 A I would, yes.

15 Q Was Invesco's support of the plan dependent on Invesco
16 receiving that indemnity included in the plan?

17 A Yes, it was.

18 Q Did you do anything to confirm the indemnification was
19 in the plan?

20 A I did reach out to Scott Greenberg from Gibson Dunn,
21 our counsel, just to make sure that I understood -- my
22 understanding was correct of the indemnity.

23 Q And what was that understanding that you wanted to
24 confirm?

25 A That we had an indemnity that would continue.

1 Q And if that indemnity were removed from the plan would
2 Invesco vote for it?

3 A No.

4 Q Now I'd like to take a step back. Defendants have
5 argued in this case that the transaction was contrary to the
6 expectations of the market and the parties; do you agree
7 with that?

8 A No, I don't. I mean, there was, you know, as we
9 discussed, a lot of loose credit agreements and a lot of
10 aggressive deals getting done. And, you know, so I think we
11 felt that this was within the realms of the credit
12 agreement. And obviously we rely a lot on our outside
13 counsel's view as well on the permissibility of it.

14 Q Had you seen transactions like the one you ultimately
15 entered into with Serta before?

16 A Certainly ones with the similar components. We were in
17 a transaction called Trident just a couple of years before
18 that where a similar debt repurchase was done.

19 And, you know, we were starting to see more and more
20 aggressive deal so, you know, there was a J. Crew
21 transaction where collateral was moved to an unrestricted
22 subsidiary and bondholders were able to exchange their debt
23 into that unrestricted subsidiary and essentially sort of
24 leapfrog over the secured creditors in that situation.

25 And there was a Pet Smart transaction where the sponsor

1 made an investment of a very small amount of a subsidiary,
2 Chewy, and then tried to say it wasn't a now wholly-owned
3 subsidiary and take away the collateral. So we were seeing
4 more and more examples of pretty aggressive deals being
5 done.

6 Q Did you believe the 2020 transaction complied with the
7 credit agreement?

8 A Yes, I did.

9 Q Why is that?

10 A Again, we knew the credit agreement was very loose and
11 allowed a lot of flexibility. And, again, also relying on
12 our outside counsel's view of the transaction and its
13 permissibility.

14 Q You testified earlier that Invesco prefers tight credit
15 agreements. Looking back, didn't you benefit from the loose
16 credit agreement here?

17 A Well, I mean, I think looking at it now we certainly
18 did benefit. But at the time it was really hard to say. We
19 were taking a very large discount on our loan, and we were
20 kind of forced to do that because we needed to do that as a
21 defensive measure to stop the alternative transaction
22 occurring, which would have, in our opinion, have been, you
23 know, very bad for us.

24 So it wasn't clear, though, when we entered into that
25 transaction and took that discount how exactly that would

1 play out, but -- so, yes, it's benefitted us now. But it
2 wasn't clear at the time that it definitely would.

3 Q Did you have any reason to think that Defendants had a
4 different understanding of what the credit agreement
5 permitted?

6 A No. I mean, they're sophisticated investors. I think
7 they understood the looseness of credit agreements. And, I
8 mean, their transaction had a lot of the same components as
9 our transaction did.

10 Q Would you have proposed the 2020 transaction that you
11 did along with the other members of the Ad Hoc Group if the
12 Defendants had not made their proposal?

13 A No. I think we would have stuck to just continuing to
14 offer the new money superpriority facility. It's a much
15 cleaner and easier way of doing it from our standpoint.

16 MS. PERLOFF-GILES: I have no further questions at
17 this time.

18 THE COURT: All right, thank you.

19 Anyone else in support of confirmation have
20 questions?

21 (No audible response.)

22 THE COURT: All right. Opposition, who's taking
23 the lead?

24 (Pause in the proceedings.)

25 MS. ALBOM: Could we take just a five-minute

1 break, Your Honor?

2 THE COURT: Of course. Do you literally just need
3 five minutes?

4 (No audible response.)

5 THE COURT: All right. So back at 5:05.

6 All right, thank you. Let's be adjourned.

7 THE CLERK: All rise.

8 (Recess taken from 4:59 p.m. to 5:07 p.m.)

9 AFTER RECESS

10 THE COURT: We are back on the Record in jointly
11 administered cases under Case No. 23-90020 and the
12 associated adversary, and we are ready to begin cross-
13 examination of Mr. Yarrow.

14 Counsel, whenever you're ready.

15 MS. ALBOM: Good afternoon, Mr. Yarrow.

16 My name is Blair Albom, and I represent the
17 Defendants and Counterclaim Plaintiffs in this litigation.

18 THE WITNESS: Afternoon.

19 CROSS-EXAMINATION

20 BY MS. ALBOM:

21 Q On Direct, you testified that you had a conversation
22 with Gamut in March of 2020 where Gamut asked you to join
23 their lender group; do you recall that?

24 A I do.

25 Q And Gamut reached out to Invesco again on or about

1 May 26th, correct?

2 A Yes, that's correct.

3 Q I'd like to show you DX-473, which is also ECF No.

4 264-3 --

5 THE COURT: It will show up on your screen,

6 Mr. Yarrow --

7 THE WITNESS: Okay.

8 THE COURT: -- as soon as they put it up for us.

9 THE WITNESS: Okay.

10 MS. ALBOM: And --

11 THE COURT: So I assume that you were doing this

12 just in the courtroom, not for GoToMeeting. I can do it

13 either way.

14 MALE SPEAKER: I'm fine.

15 THE COURT: Okay.

16 MS. ALBOM: Your Honor, may I approach the

17 witness?

18 THE COURT: Sure, and he'll get it in just a

19 minute. It's totally up to you, however you'd like to do

20 it.

21 (Counsel discusses waiting for the exhibit to

22 display.)

23 THE COURT: Remember, when you're at the lectern,

24 you control the courtroom. Don't let the courtroom control

25 you.

1 MS. ALBOM: Thank you, Your Honor.

2 THE COURT: There we go.

3 MS. ALBOM: Okay.

4 BY MS. ALBOM:

5 Q Mr. Yarrow, is this an email between you and Paul
6 Tribiani (phonetic), who's also of Invesco?

7 A Yes, it is.

8 MS. ALBOM: I'd like to admit this into evidence,
9 Your Honor.

10 THE COURT: Any objection?

11 MS. PERLOFF-GILES: No objection, Your Honor.

12 THE COURT: It's admitted.

13 (Exhibit DX-473, ECF 264-3, received in evidence.)

14 BY MS. ALBOM:

15 Q Mr. Yarrow, if you'll go with me to the bottom email,
16 Mr. Tribiani emails you, and he says, "I got an urgent call
17 from Gamut just now. They are concerned the company has
18 effectively restricted two separate groups of 1-Ls with the
19 end goal of launching a J. Crew type financing around one of
20 the groups."

21 And then, above that, you respond, "Paul, I'm not
22 surprised they are calling you now. I think we need to keep
23 Gamut at arm's-length right now."

24 Do you see that?

25 A I do.

1 Q You wanted to keep Gamut at arm's-length because they
2 were the competition, correct?

3 A Yeah, I mean, we were working with an Ad Hoc Group,
4 and typically, we wouldn't have one-off conversations with
5 other lenders outside of the Ad Hoc Group.

6 Q And so, to your knowledge, no one from Invesco
7 responded to Gamut, correct?

8 A That's correct.

9 Q Okay. Invesco was part of the Ad Hoc Group
10 represented by Gibson Dunn in the 2020 transaction, correct?

11 A That's correct.

12 Q And in addition to the Ad Hoc Group, certain other of
13 Serta's first and second lien lenders participated in the
14 2020 transaction, correct?

15 A Yes.

16 Q Invesco was not involved in deciding which of Serta's
17 lenders outside the Ad Hoc Group participated in the 2020
18 transaction, correct?

19 A Yes, that's correct.

20 Q And Invesco was not involved in the decision to admit
21 Barings into the deal, correct?

22 A Yes, that's correct.

23 Q And Invesco wasn't involved in the decision to admit
24 any other lender into the deal, correct?

25 A That's correct.

1 Q And Invesco was not asked for its input about which
2 lenders to include in the 2020 transaction, right?

3 A Right.

4 Q And Invesco didn't have any influence over which
5 lenders would be included in the 2020 transaction, right?

6 A That's right.

7 Q And Invesco didn't advocate for certain lenders to be
8 excluded from the 2020 transaction, correct?

9 A That's correct.

10 Q And as far as you're aware, none of the other Ad Hoc
11 Group members advocated for certain members to be included
12 or excluded from the 2020 transaction, correct?

13 A As far as I'm aware, although I can't really speak for
14 all of them.

15 Q And in fact, prior to closing, Invesco didn't even
16 know who else was going to be in the deal, other than the
17 members of your Ad Hoc Group, correct?

18 A That's correct.

19 Q You're aware that as part of the 2020 transaction,
20 Serta indemnified the lenders who participated in the 2020
21 transaction, correct?

22 A Yes.

23 Q Okay, and that included Invesco, right?

24 A Yes.

25 Q Invesco wasn't directly involved in the negotiation of

1 that indemnity, correct?

2 A That's correct.

3 Q And that the time that the provision was being
4 negotiated, you didn't know what terms were being
5 negotiated, correct?

6 A Maybe not the exact terms, no.

7 Q And Invesco was not involved in any discussions
8 concerning the survival of those indemnification obligations
9 as part of Serta's Chapter 11 Plan, correct?

10 A Well, we were part of the Ad Hoc Group in discussing
11 the RSA.

12 Q You mean, you discussed that with the Ad Hoc Group?

13 A We discussed the terms of the RSA for sure. Yes,
14 absolutely.

15 Q Will you go with me to page 212, Line 15 of your
16 deposition? You recall giving a deposition in this case,
17 correct?

18 (No audible response.)

19 BY MS. ALBOM:

20 Q And you were asked during your deposition:

21 "Q Did Invesco have any discussions as part of the
22 Ad Hoc Group concerning the survival of Serta's
23 indemnification obligations with respect to the PTL Lenders?

24 "A No."

25 Did I read that correctly?

1 A Yes.

2 Q On Direct, you mentioned being involved in a
3 transaction called Trident. That transaction was fully
4 consensual, right?

5 A I mean, it ended up being fully consensual.

6 Q And to your knowledge, prior to the Serta transaction,
7 had there ever been a transaction involving a credit
8 agreement that had a waterfall with existing debt where the
9 holders of the 1-L debt were *pari passu* to each other, and
10 unanimity was required to change that, and new money was
11 priming the 1-L level, and the company would be purchasing
12 debt at a discount?

13 A Well, I think the Trident deal was similar to that,
14 and I mean, there were other transactions in the market that
15 we were not involved with that did involve similar type,
16 similar components to that.

17 Q The transaction at issue in this case, the Serta
18 transaction was not on consent on all existing first lien
19 lenders, was it?

20 A It was not.

21 MS. ALBOM: No further questions, Your Honor.

22 THE COURT: All right, thank you.

23 MR. LIEBERMAN: Good afternoon, Mr. Yarrow.

24 THE WITNESS: Good afternoon.

25 MR. LIEBERMAN: I'm Neil Lieberman from Holwell

1 Shuster & Goldberg. I represent LCM.

2 CROSS-EXAMINATION

3 BY MR. LIEBERMAN:

4 Q You don't have any recollection of LCM being invited
5 to participate in the June 2020 transaction, right?

6 A That's right.

7 Q And you don't have any recollection of LCM
8 participating in any alternative proposal to the June 2020
9 transaction, right?

10 A That's right.

11 Q You're aware that the first lien credit agreement had
12 to be amended to permit the transaction, right?

13 A That's right.

14 Q And you voted for the amendments, right?

15 A Yes.

16 Q Did you ever consider voting for the amendments
17 without participating in the exchange?

18 A No.

19 Q And that's because it was all one transaction, right?

20 A That's right.

21 MR. LIEBERMAN: Thank you very much.

22 THE COURT: Thank you, Mr. Lieberman.

23 MR. GOLDMAN: Nothing from me, Your Honor.

24 Thank you.

25 THE COURT: Come on. You've got to have

1 something.

2 (Laughter)

3 THE COURT: Okay, all right.

4 Any Redirect?

5 MS. PERLOFF-GILES: Just briefly, Your Honor.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MS. PERLOFF-GILES:

9 Q You were just asked a question about the consent
10 requirements for the credit agreement?

11 A Yeah.

12 Q Is it your understanding that the consent of all
13 lenders was required to issue the priming debt?

14 A No.

15 MS. PERLOFF-GILES: No further questions.

16 THE COURT: All right, any Recross on that one
17 question?

18 MS. ALBOM: No, Your Honor.

19 THE COURT: All right, thank you.

20 Any reason that Mr. Yarrow cannot be excused?

21 (No audible response.)

22 THE COURT: Mr. Yarrow, first of all, I want to
23 thank you for your time. Your testimony's been very
24 helpful. I know you are a busy man. I appreciate you
25 taking the time out of your schedule.

1 You are relieved from the rule. That means you
2 can stay in the courtroom and observe if you wish. You are
3 also free to go.

4 THE WITNESS: Thank you very much.

5 THE COURT: Thank you, sir.

6 (Witness steps down.)

7 THE COURT: Wondered when I was going to see you.

8 MR. WELCH: The yeomen are working, Your Honor.

9 For the Record, Alexander Welch, Weil Gotshal &
10 Manges, for the Debtors.

11 THE COURT: Yes, sir.

12 MR. WELCH: If we could impose upon your
13 generosity a little bit longer --

14 THE COURT: Sure.

15 MR. WELCH: Thank you, Your Honor.

16 We have three witnesses. Two will just be by
17 Declaration. I understand that there will not cross on
18 those, but they're available for Cross.

19 We'd like to move Mr. Linker in, who we'll be
20 moving a Declaration, but with some supplemental Direct as
21 well.

22 THE COURT: All right. So, you want to do the
23 two easy ones first?

24 MR. WELCH: I think I'd rather do the two easy
25 ones after.

1 THE COURT: Oh, okay. Fair enough.

2 MR. WELCH: Mr. Tsekerides, he'll be doing
3 Direct.

4 THE COURT: All right.

5 Mr. Tsekerides, good afternoon.

6 MR. TSEKERIDES: I was going to flip it. but
7 we'll go that way. It's fine.

8 THE COURT: All right.

9 MR. TSEKERIDES: Good afternoon, Your Honor.

10 I know it's been a long day. I appreciate the
11 indulgence.

12 THE COURT: No, it's all -- I mean, I look so
13 forward to Citadel coming up with some interesting questions
14 I'm still trying to figure out. I didn't get on that round.

15 MR. TSEKERIDES: I'm new to the game. So, we'll
16 see.

17 THE COURT: I'm disappointed.

18 All right.

19 MR. TSEKERIDES: So, we'll start with Mr. Linker.
20 He's the Chief Financial and Operations Officer for the
21 Debtors.

22 THE COURT: All right.

23 MR. TSEKERIDES: His Declaration is at
24 Document 884, and we're going to ask to move that in with
25 the exhibit that's attached, and then we're going to present

1 some supplement Direct.

2 THE COURT: All right, hold on just one second.

3 MR. TSEKERIDES: I'm sorry, Theodore Tsekerides
4 from Weil, the Debtors.

5 THE COURT: All right. So, I don't ever read
6 these until they've been admitted. And so, I'm looking at
7 this for the first time. And so, I want to make sure the
8 exhibit that you're talking about is just the consolidated
9 P&L that's attached at the end, that's two pages, or is it
10 something more?

11 MR. TSEKERIDES: No, that's correct. Well, it's
12 the financial projections that appear at Appendix A -- so,
13 19 of 24 on that document --

14 THE COURT: Right.

15 MR. TSEKERIDES: -- which are the same as
16 Exhibit H to the Disclosure Statement.

17 THE COURT: All right, fair enough. So, let me
18 do it this way -- and I want to make sure that everyone
19 understands. I don't admit Declarations if there is any
20 objection at all. So, this only gets done by a consensus.

21 So, I want to make sure are there any objections
22 to the admission of Mr. Linker's Declaration found at Docket
23 No. 884, including what's marked as Appendix A titled
24 "Financial Projections"?

25 MR. SEILER: No objection, as tempting as it is

1 to object, but no, we don't have an objection.

2 THE COURT: Yeah, then it would get to be fun,
3 and we would see where this goes.

4 With that, I will admit the Declaration of
5 Mr. Linker at 884.

6 (Exhibit 884 received in evidence.)

7 THE COURT: And then you're going to call
8 Mr. Linker and supplement it?

9 MR. TSEKERIDES: Correct.

10 THE COURT: All right, thank you.

11 MR. SEILER: So, I'd like to do that right now.

12 THE COURT: Of course.

13 Mr. Linker, if you'd please come forward?

14 I know that you were looking forward to like a
15 six-hour Cross.

16 If you would, please, raise your right hand.

17 (Witness sworn.)

18 THE COURT: All right. Thank you, sir.

19 MR. TSEKERIDES: May I inquire, Your Honor?

20 THE COURT: Of course.

21 DIRECT EXAMINATION

22 BY MR. TSEKERIDES:

23 Q Can you please say your name for the Record, sir?

24 A John Linker.

25 Q Mr. Linker, are you currently employed?

1 A I am.

2 Q And by who?

3 A Serta Simmons Bedding.

4 Q And what position do you hold at Serta?

5 A I'm Chief Financial and Operations Officer.

6 Q When did you become the Chief Financial and Operations
7 Officer?

8 A I joined the company as CFO in April of 2022 and added
9 the operations responsibilities earlier this year.

10 Q Where did you work before Serta?

11 A Sheldon Holding.

12 Q What kind of company is that?

13 A Manufacturer of doors and windows.

14 Q And what position did you have there?

15 A I was CFO from 2018 to 2022, and prior to that, held
16 leadership positions from 2012 to '18.

17 Q Just very briefly, what's your educational background?

18 A I have an undergraduate degree and an MBA from Duke.

19 Q What are your duties and responsibilities as the Chief
20 Financial and Operations Officer of Serta?

21 A I've got responsibility for financial reporting,
22 accounting, treasury, cash management, financial planning
23 and analysis, as well as responsibility for our
24 manufacturing operations and outsourcing activities.

25 Q In that role, are you knowledgeable and familiar with

1 the Debtor's business and financial affairs?

2 A I am.

3 Q Are you generally familiar with the terms and
4 provisions of the Plan of Reorganization in this case?

5 A I am.

6 Q Are you aware of the feasibility requirement in order
7 for a plan to be confirmed?

8 A I am.

9 Q What's your general, non-lawyer understanding of that?

10 A I understand that the company needs to be able to make
11 all of the payments required under the plan post-emergence
12 and that it would need to be unlikely that the reorganized
13 company would be facing another restructuring event.

14 Q Have the Debtors prepared any analysis to determine
15 whether the proposed plan, in this case, is feasible?

16 A We have.

17 Q What analysis is that?

18 A That was the financial projections that we included
19 with the Disclosure Statement.

20 Q And were you personally involved in preparing those
21 financial projections?

22 A I was.

23 Q Who at Serta is ultimately responsible for those
24 projections?

25 A That's my responsibility.

1 Q Can you describe for the Court how the Debtors went
2 about preparing the financial projections?

3 A Yes. So, myself and the management team took upon an
4 exercise to build on a new business plan to turn around the
5 financial performance of the company. So, it was a set of
6 strategic initiatives that would grow our sales, grow our
7 market share, improve our cost structure, improve our
8 profitability. We worked on that for a couple of months and
9 pressure tested those assumptions, and then ultimately,
10 those initiatives and that business plan is what formed the
11 inputs for the financial projections.

12 Q Do you believe the business plan is achievable and
13 realistic based on the information known to you today?

14 A I do.

15 Q Do you believe the financial projections are
16 achievable and realistic based on the information known to
17 you today?

18 A I do.

19 Q Why do you believe that?

20 A Well, the plan, the business plan and financial
21 projections are based off of a detailed set of assumptions
22 that were done at a sort of bottoms-up basis, and I
23 evaluated those assumptions in two ways.

24 First of all, just from my professional experience, I
25 evaluated the assumptions relative to the company's

1 capabilities and the company's cost structure. And then
2 secondly, I benchmarked those assumptions and those metrics
3 against the company's historical financial performance.

4 In both cases, I concluded that the projections were
5 reasonable.

6 Q Are you aware of a settlement between the Debtors and
7 the Creditors Committee?

8 A I am.

9 Q Did that settlement exist at the time you prepared the
10 financial projections?

11 A It did not.

12 Q Do you believe that the financial projections need to
13 be modified or altered in any as a result of that
14 settlement?

15 A I don't.

16 Q Why not?

17 A The cash payment tied to the settlement with the UCC,
18 I believe it's immaterial relative to the overall actual
19 projections in the aggregate from 2023 to 2027. And I also
20 believe that some of our assumptions or cash flow-related
21 items in the projections have enough room to absorb that
22 level of payment.

23 Q Has anything else changed since the projections were
24 developed that would cause you to modify or alter your
25 financial projections?

1 A No.

2 Q Are you aware of the Debtor's indemnification
3 obligation to the PTL Lenders proposed under the plan?

4 A I am.

5 Q Do the financial projections include any cash payments
6 in connection with that indemnification obligation?

7 A No, they don't.

8 Q Why not?

9 A Well, first of all, I'm not aware that the indemnified
10 parties have suffered a loss or that they actually owe any
11 damages that are quantified or quantifiable. So, on that
12 basis, I don't have any information to estimate a cash
13 payment to put in the projection, and also, the timing of
14 any such payment is uncertain, so -- or even whether it
15 would occur within the projection period and through 2027.
16 So, on that basis, without knowing the amount and the
17 timing, it's not possible for me to include that in the
18 financial projection.

19 Q Does the plan contemplate a redemption transaction
20 that would potentially result in the Reorganized Debtors
21 obtaining a tax refund?

22 A It does.

23 Q How much is that potential tax refund?

24 A I understand it to be approximately \$50 million.

25 Q Is that potential tax refund in the financial

1 projections?

2 A No, it's not.

3 Q Why not?

4 A Well, I'd say similar to the indemnity, there's some
5 uncertainty around the amount we're going to have to work
6 through with the IRS around finalizing the amount, and
7 presumably, there'd be some sort of audit process around a
8 refund of that size, and also, the timing is very uncertain.
9 So, without knowing the amount or the timing of the payment,
10 or the cash inflow, in that case, we did not include it in
11 the projections.

12 Q Do the Debtors still stand behind the financial
13 projections?

14 A We do.

15 Q Based on the financial projections, will the
16 Reorganized Debtors have sufficient resources to service
17 their debts and make all known payments that are called for
18 under the plan?

19 A Yes.

20 Q Based on those same projections, is the Debtor's
21 reorganization likely to be followed by a liquidation or
22 another reorganization?

23 A No.

24 Q Why not?

25 A The cash flow projections of the financial projections

1 show that we're cash flow positive for the period of 2023 to
2 2027 in aggregate.

3 So, on that basis, I conclude that the company is able
4 to make all the payments required under the plan. I also
5 conclude that that would mean the company's liquidity
6 position and capital structure would be healthy and not
7 require another restructuring.

8 Q Would there be any impacts on the Debtors if there's
9 any significant delay in confirming the plan?

10 A I believe there would.

11 Q And what would the impact be?

12 A I think there's a couple of aspects. We've set
13 expectations with customers, suppliers, employees that we're
14 going to complete this restructuring consistent with the
15 original timetable, which had confirmation this week and
16 emergence later in May, or at the latest, June 6th, I think,
17 is the outside date in the RSA. And so, if that were to get
18 significantly extended, I do believe that would create doubt
19 in the marketplace on our viability as an industry player.

20 Also, this is a very expensive process and we're
21 burning a lot of cash on a weekly basis on professional fees
22 tied to this process. So, an extension would hurt our
23 liquidity position because presumably, that would mean more
24 professional fees.

25 And then finally, that has a knock-on effect to our

1 exit credit facility. There is a minimum cash requirement
2 and a minimum liquidity or availability requirement at our
3 exit ABL facility, and we're burning cash for an extended
4 period of time with a delay, that could risk our ability to
5 close the facility.

6 So, I think all of those factors could have an impact
7 on our ability to achieve the financial projections.

8 MR. TSEKERIDES: Thank you.

9 I have no further questions, Your Honor.

10 THE COURT: Okay, thank you.

11 Anyone else in support of confirmation have
12 questions?

13 (No audible response.)

14 THE COURT: All right, thank you.

15 Mr. Seiler?

16 MR. SEILER: Thank you, Your Honor.

17 Good afternoon. My name's Eric Seiler. I
18 represent the lenders who are not in the PTL group.

19 THE WITNESS: Good afternoon.

20 CROSS-EXAMINATION

21 BY MR. SEILER:

22 Q When did you do the financial projections that you
23 talked about just now?

24 A The process started in summer of 2022, and the
25 projections, the operating projections were finalized in

1 December. And then, we updated after the RSA was signed for
2 capital structure-related items during the spring, and they
3 were finalized with the March 2023 Disclosure Statement.

4 Q The end was March of '23?

5 A Correct.

6 Q And do you have 884 that was offered for you in front
7 of you or not?

8 A I don't have any exhibits in front of me.

9 MR. SEILER: Is there any way we could give him
10 the --

11 THE COURT: What is it that you --

12 MR. SEILER: His Declaration.

13 THE COURT: I can handle that one.

14 MR. SEILER: Well, I hate to make you do it, Your
15 Honor.

16 THE COURT: That's okay. My goal in life is to
17 be your IT person.

18 (Laughter)

19 THE COURT: What would you like?

20 MR. SEILER: You could be so sure that that's not
21 your goal in life because my IT person will be sad as well.

22 If you go to page 5 of 24, that's the only page
23 I'm going to ask him about.

24 THE COURT: Okay.

25 MR. SEILER: Okay, that's -- the big bullet in

1 the middle, I think he can see it. There you go. "If the
2 holder."

3 BY MR. SEILER:

4 Q You see the bullet that describes the treatment of the
5 6A trade?

6 A I do.

7 Q And are you familiar with that treatment?

8 A I am.

9 Q And you see how that's something that was negotiated
10 between the company and the Unsecured Creditors Committee,
11 that treatment that's in the plan?

12 A I believe the 6B was the negotiation, but yes, I
13 mean, --

14 Q So, you see how they're getting paid within 60 days of
15 the effective date, the bottom of the section?

16 A Yes.

17 Q Wasn't it an earlier version of this they were going
18 to get paid within a year?

19 A I believe the previous language said up to a year.

20 Q And now, it's only 60 days; do you know why the
21 representatives of the trade creditors wanted it to be so
22 much shorter?

23 A I'd have to ask them.

24 Q Was it because they were concerned about the company
25 assuming the obligation under the indemnity?

1 A I don't know.

2 Q So, let's talk about the indemnity for a second. I
3 heard you say you don't know when it might be called on and
4 you don't know how big it would be. And so, you valued it
5 at zero in your projections?

6 A I didn't say that.

7 Q You didn't add it to your projections and count it?

8 A I did not include an estimate for the indemnity in the
9 projections.

10 Q Which, functionally, that means you counted it at
11 zero. Other liabilities that you could measure, you
12 included the amount for those liabilities.

13 A To the extent that a liability was estimable, it would
14 be on our balance sheet; and therefore, we would have a need
15 to reserve for that and pay it in the future. Those types
16 of liabilities are included in the projections.

17 Q And this liability on the indemnity is excluded,
18 there's no allowance for it?

19 A The projections do not include an estimate for any
20 indemnity cash payments.

21 Q But you do know that the lenders have all said -- you
22 weren't here back in 2020, but they've said now, in
23 connection with the RSA and the plan and the exit financing,
24 that getting that indemnity is very important to them and
25 they wouldn't have supported the plan if they didn't get the

1 indemnity; do you know that?

2 A I understand they required it as a provision in the
3 RSA. So, I understand that to be important to them.

4 Q So, people don't typically require things that have no
5 value, right?

6 A I don't know what you mean by that.

7 Q Well, if something didn't matter, you wouldn't insist
8 upon it, would you? Let me ask it this way: Does it
9 trouble you that all the lenders who voted for the plan are
10 making their support contingent on getting an indemnity that
11 you have valued at zero in your projections for feasibility?

12 A I'm not troubled by that.

13 Q And you haven't changed your thinking about the
14 indemnity at all since this case started in March of 2023?

15 A I haven't changed my thinking about the indemnity, no.

16 MR. SEILER: That's all I have, Your Honor.

17 THE COURT: All right, thank you.

18 Anyone else?

19 (No audible response.)

20 THE COURT: Mr. Millar, come on up.

21 This is the witness you've been waiting for.

22 MR. MILLAR: Mr. Seiler sort of stole my thunder.

23 THE COURT: No, he didn't. I promise you he
24 didn't.

25 MR. MILLAR: Good afternoon, Mr. Linker.

1 How are you?

2 THE WITNESS: Good afternoon.

3 CROSS-EXAMINATION OF JOHN LINKER

4 BY MR. MILLAR:

5 Q So, you testified that the indemnity is a contingent
6 obligation; is that right?

7 A I don't know if I would use the word contingent, but
8 the indemnified parties would have to suffer a loss in order
9 for us to fulfill our portion of the indemnity.

10 Q But let's call that the contingency, okay? And if
11 they do suffer the loss, the Debtors might have to pay out a
12 really big number, right?

13 A I don't know what the number would be.

14 Q Could it be a billion dollars?

15 A I don't know.

16 Q You have no idea how much that number could be?

17 A I don't know how big the indemnity payment might be.

18 Q And you don't know the likelihood that the company
19 might have to pay out, do you?

20 A I don't.

21 Q And it's just simply not included in your projections,
22 correct?

23 A That's correct.

24 Q Would you agree that the number was big enough where
25 you may have -- the company may have to file bankruptcy

1 again, or do you not know?

2 A I don't know how big the number is.

3 MR. MILLAR: That's all I have, Your Honor.

4 THE COURT: All right, thank you.

5 Anyone else?

6 (No audible response.)

7 THE COURT: Any Redirect?

8 MR. TSEKERIDES: No, Your Honor.

9 THE COURT: All right, thank you.

10 Mr. Linker, I very much appreciate your
11 testimony. I assume that you will hang around in the
12 courtroom in case I need to talk to you.

13 THE WITNESS: Okay, thank you.

14 THE COURT: All right. Thank you, sir.

15 (Witness steps down.)

16 THE COURT: Okay, sir.

17 MR. TSEKERIDES: Next up, we have the Declaration
18 of Michael Talerico. He's the Managing Director at FTI
19 Consulting. That is at Document 881, and there's an
20 attachment to that document which was also Exhibit E to the
21 Disclosure Statement. So, we ask that be moved into
22 evidence.

23 THE COURT: All right, thank you.

24 Give me just a moment.

25 MR. TSEKERIDES: Sure.

1 (Pause in the proceedings.)

2 THE COURT: So, there are actually two
3 attachments, it's his résumé, as well as the liquidation
4 analysis, correct?

5 MR. TSEKERIDES: That's correct. It's pages 1
6 through 49.

7 THE COURT: I scanned through it. I just want to
8 make sure --

9 MR. TSEKERIDES: Yup.

10 THE COURT: -- that's what we were talking about.

11 MR. TSEKERIDES: Yup.

12 THE COURT: All right, any objection to the
13 admission of the Declaration of Mr. Talerico found at -- and
14 the two attachments to that Declaration -- found at Docket
15 No. 881?

16 MR. SEILER: No objection.

17 THE COURT: All right, thank you.

18 It's admitted.

19 (Exhibit 881 received in evidence.)

20 THE COURT: Anyone wish to Cross-examine
21 Mr. Talerico?

22 (No audible response.)

23 THE COURT: Mr. Talerico here?

24 MR. TSEKERIDES: He is.

25 THE COURT: You can sprint for the door. Thank

1 you, sir.

2 MR. TSEKERIDES: And the last one, we have Emily
3 Young, a Senior Consultant at Epiq. She is, I believe,
4 somewhere on the screen, although I don't know that we have
5 that.

6 THE COURT: There's no challenge to the ballot
7 summary, is there? I hadn't seen one.

8 (No audible response.)

9 MR. TSEKERIDES: Let me go through the process,
10 then.

11 THE COURT: Of course.

12 MR. TSEKERIDES: So, that is at Document 779.
13 There's a Declaration and a couple of exhibits with the
14 tallies. And she's a Senior Consultant at Epiq.

15 And we ask that that be moved into evidence.

16 THE COURT: All right, thank you.

17 Anyone object to the admission of the Declaration
18 of Ms. Young found at Docket No. 779, including the
19 attachments?

20 MR. SEILER: No objection.

21 THE COURT: All right, thank you.

22 It's admitted.

23 (Exhibit 779 received in evidence.)

24 THE COURT: Anyone wish to cross-examine
25 Ms. Young?

1 MR. SEILER: No.

2 THE COURT: All right, thank you.

3 Then Ms. Young -- is she in the courtroom?

4 MR. TSEKERIDES: No, she was going to be on --

5 THE COURT: She was going to be on -- Ms. Young,
6 if you are on the phone line, you are free to go.

7 Thank you for your hard work.

8 MR. TSEKERIDES: That concludes my portion of the
9 events.

10 THE COURT: Okay, that's --

11 MR. TSEKERIDES: Thank you.

12 THE COURT: Yes, sir.

13 MR. MILLAR: Okay. Your Honor, good evening.

14 Just a couple of housekeeping issues. So, the
15 Debtors have some 30(b)(6) corporate deposition testimony
16 that they would like to submit as part of the Record. We
17 are working with the other side to see if there are any
18 objections or cross-designations.

19 I guess, the question for Your Honor is we're
20 hoping to get it done by tomorrow, but if not, would it be
21 okay if we submitted it before the end of the week?

22 THE COURT: Certainly. Let me -- can we talk
23 about these things because if you're going to make me read
24 things, I really don't like getting a depo that is marked,
25 you know, pink, green, and yellow.

1 And number one, it's really hard because -- I
2 don't follow directions very well. So, it's hard to expect
3 me to stay within the colors. If you've got -- I don't want
4 to say this. If the depositions are reasonable in length,
5 unless there's something objectionable, why don't you just
6 give them to me and let me read them?

7 MR. MILLAR: That would be fine, Your Honor

8 THE COURT: And it'll save you the time of
9 fighting about Line 12 and Line 15. Just give them to me.

10 MR. MILLAR: Okay, that'll be fine. We can do
11 that, Your Honor. We'll submit those. We could just submit
12 them formally tomorrow if that's okay.

13 THE COURT: That's perfect.

14 MR. MILLAR: And then, we're also working on
15 trying to resolve some stipulated exhibits, and we're hoping
16 to get that done relatively soon as well.

17 THE COURT: Okay.

18 MR. MILLAR: Other than that, I think we are done
19 with our side. My understanding is that tomorrow they'll be
20 calling a witness from Apollo and a witness from Gamut, and
21 then I think we'll be done with the live testimony tomorrow.

22 THE COURT: All right.

23 Mr. Seiler, is that going to fit within your
24 schedule?

25 MR. SEILER: That's all true. That's all true,

1 Your Honor, and I think what it means for certainty for the
2 Court's point of view is there won't need to be Friday.

3 THE COURT: Okay. So, I can go ahead and use the
4 time, I can go ahead and give the Friday away? I've got a
5 number of requests, and if you know you're not going to need
6 it, then I'm going to give it away.

7 MR. SEILER: I look back at the rest of the room
8 to see if I can speak for anyone.

9 THE COURT: Okay, no. And so, just because I
10 want to make sure because I don't anyone to get cut short.

11 So, your two witnesses, Apollo and Gamut, I mean,
12 if you had to guess -- are you doing the direct, or is some
13 of your colleagues doing it?

14 MR. SEILER: This young man here is --

15 THE COURT: Okay, Mr. Ehrlich?

16 MR. EHRLICH: Young, that's great. Young.

17 I do not anticipate a Direct in excess of an hour
18 on either of them.

19 THE COURT: So, we ought to get one done in the
20 morning and one done in the afternoon?

21 MR. EHRLICH: At the latest.

22 THE COURT: At the latest, okay. All works for
23 me.

24 And we still think that the schedule in terms of
25 having some time to prep for closing, that sort of thing --

1 MR. SEILER: I believe, Your Honor, you scheduled
2 the closing for a week from Thursday.

3 THE COURT: No, yeah. I just want to make sure
4 that still worked.

5 MR. SEILER: That would be perfect for us.

6 THE COURT: Okay.

7 MR. SEILER: And each side has proposed Findings
8 of Fact and Conclusions of Law, and briefing before that so
9 you have an advance.

10 THE COURT: Okay, that sounds terrific.

11 MR. SEILER: And we'll see you after tomorrow, a
12 week later.

13 THE COURT: Okay, and that's all fine.

14 MR. SEILER: That's correct? Do I have it right?

15 MR. EHRLICH: I'm sorry, I didn't quite hear.

16 MR. SEILER: The closing's a week later, and the
17 briefing in between, and the proposed findings -- I didn't
18 want to speak for the Debtor.

19 MR. EHRLICH: Yeah, that sounds right to us,
20 Judge, given we finished a day early unless you had any
21 other time.

22 THE COURT: So, I mean this as a genuine
23 question. Some of you know me, some of you don't. I have
24 this tendency to start talking and I certainly, if there are
25 -- I know that things happen outside the door because I

1 lived for a long time outside the door.

2 If there are things being discussed, I don't want
3 to put my finger on the scale, and I'll just be quiet and
4 I'll wait until closing if I have something to say. I'm
5 also -- I mean, if you get me going, you know, it's the
6 Energizer Bunny. You wind me up, you can't turn me off.
7 And so, I just want to make sure that's -- I'm looking for
8 some guidance.

9 MR. EHRLICH: I think, at this point, Your Honor,
10 I think we're prepared to go to closing.

11 THE COURT: So, the question is -- see,
12 Mr. Hermann's going to come up here because he's seen me do
13 this before.

14 (Laughter)

15 MR. SEILER: I only seen it from the back. So,
16 I'm going to --

17 THE COURT: No, no, no. Mr. Hermann -- again,
18 and I mean, this as a genuine question. I'm not suggesting
19 -- you know I don't believe that parties should settle
20 everything. I'm here to resolve disputes, but I also know
21 that people listen very closely to what I say. Sometimes I
22 get it right, sometimes I don't.

23 This is a complicated matter, and I have a lot of
24 views as I sit here right now about certain things. I am
25 perfectly happy to keep all of them to myself and wait until

1 closing if there's a reason to do that. If there's not, you
2 know, I may start asking questions about potentially things
3 that I want briefed, things that I don't want briefed.

4 MR. HERMANN: Sure.

5 THE COURT: And again, I'm genuinely looking for
6 guidance because again, I think you, and I said this before,
7 and I mean, I think you all are just simply the best there
8 are and I don't want to get in the way of really great
9 people doing really great things.

10 MR. HERMANN: Can I go?

11 MR. EHRLICH: Yeah.

12 MR. HERMANN: Your Honor, for the Record, Brian
13 Hermann from Paul Weiss.

14 You asked a very simple question. I'm prepared
15 to give you a very simple answer.

16 THE COURT: Okay.

17 MR. HERMANN: There are no discussions.

18 THE COURT: Okay.

19 MR. HERMANN: There should be discussion in my
20 opinion. I listened to when you told Mr. Millar to go find
21 a friend.

22 THE COURT: Uh-huh.

23 MR. HERMANN: He can speak for himself, but I
24 think he's still in search of a friend, and that's where it
25 stands.

1 THE COURT: Fair enough, okay.

2 MR. HERMANN: I actually think it would be
3 helpful, Your Honor, to get some guidance, but it's
4 completely up to Your Honor.

5 Thank you.

6 THE COURT: Okay, fair enough.

7 MR. MILLAR: May I speak for myself?

8 THE COURT: Of course, you can.

9 (Laughter)

10 MR. MILLAR: So, Your Honor, look, I have an
11 idea, and maybe no one likes it, but one of the things that
12 we have faced in this case, and that I know you're aware of,
13 is that all of these different parties are locked up. And
14 so, here's my idea.

15 What if between now and closing you put us in a
16 mediation where we could have discussions, perhaps in front
17 of Judge Isgur or someone else, where people didn't have to
18 worry about doing something other than trying to solve the
19 problem for the Debtor?

20 THE COURT: So, a couple of reactions to that.
21 Number one, I don't want to say never, but I don't think
22 I've ever ordered anybody to mediation that didn't want to
23 go because that just doesn't seem appropriate to me, and
24 I've never conditioned anything on going to mediation first.

25 That all being said, Isgur owes me so much. I

1 actually think --

2 (Laughter)

3 THE COURT: I actually think I can stop his
4 calendar and get him to be available if the parties wanted
5 to go have a settlement conference with Judge Isgur. It is
6 certainly not required. It doesn't matter to me one way or
7 the other if you go or not. I am genuinely indifferent.

8 I find this problem interesting. And you know,
9 my view is I'm going to try to do the right thing. And I
10 already know that everybody knows how to appeal me if they
11 don't think I got it right. And I want to be very open
12 about this.

13 You know, I hinted at this earlier in the trial
14 when I specifically told you, and I hope everybody was
15 listening, that I didn't give a definition of an open-market
16 purchase, and I didn't do that on purpose knowing that I'll
17 likely see that again in the terms of a request for
18 additional Findings of Fact and Conclusions of Law or the
19 Circuit will just impart their own definition.

20 I did that out of respect for you all so that it
21 gave you wiggle room. What you all have done thus far is
22 you've retried the issue. So, I'm going to address it. So,
23 that's coming. You may like it, you may not like it. You
24 know that I'm a commercial lawyer, and I've lived down in
25 street fights for 30 years. I didn't have the benefit of

1 sitting up with clients that had billions of dollars that
2 could just say yes and no. Everything my folks ever got is
3 because I ran over somebody.

4 That means what it means. So, again, everybody's
5 -- I'm just trying to be completely transparent in what I
6 was trying to do.

7 So, if you decide that you want to go visit with
8 Judge Isgur -- he's in Corpus today -- I will catch him on
9 his way back from Corpus if it's helpful, but if you don't
10 want to go visit with Judge Isgur, then by all means, please
11 don't waste his time. He will absolutely do what I ask him
12 to do, but I'm not going to ask him unless you all tell me
13 that you think it might be beneficial.

14 MR. SCHROCK: Your Honor, you know, as a lawyer
15 that's been living with this dispute for the last three
16 years --

17 THE COURT: Sure.

18 MR. SCHROCK: -- I can say, I think, at this
19 moment, I would say I don't think that would be helpful.

20 THE COURT: Okay.

21 MR. SCHROCK: What I do think is always helpful,
22 Your Honor, is that when we finish up the evidence tomorrow,
23 getting your thoughts and perspectives as we move to
24 closing, I think that's always going to be helpful for the
25 parties, and frankly, it could help people think about what

1 things to focus on, you know, heading into closing, for one,
2 and you know, any other thoughts that you may have are
3 always welcome, but from the Debtor's perspective I think
4 that, I would hope, from everybody's perspective, we'd like
5 to get that.

6 THE COURT: So, I'll certainly think about that
7 although -- I mean, just trying to be completely transparent
8 -- I mean, you and Mr. Hermann are two of simply the best
9 I've ever seen. I mean, there are times in my career I
10 wanted to be like both of you because I saw what you did. I
11 mean, I can't imagine that between the two of you haven't
12 thought through the things -- now, I may look at them
13 different, but I can't imagine that you haven't thought
14 through all of these things.

15 But I'll give it some thought and if, you know, I
16 may, you know, I may talk about specific questions I would
17 like answered in briefing, you know, that sort of thing. I
18 may think about this and say I want argument and then
19 briefing. I mean, I know we've talked about that --

20 MR. SCHROCK: Sure.

21 THE COURT: -- but I may change my mind about
22 that. But I'll give it some thought. Again, I am perfectly
23 comfortable in just taking this all the way to the very end.
24 My reason for raising this was I simply didn't want to
25 disturb anything that might be going on out in the hall, and

1 you know, since Mr. Hermann told me you were buying dinner
2 tonight -- you were out of the room when he said that -- no,
3 I'm just joking.

4 You know, if things change -- you know, you can
5 come in tomorrow and tell me something different. I'm going
6 to take your comments at face value. I'm going to think
7 about it. And you know, again, you know, you know I'm not a
8 baby splitter. I just simply don't believe in it.

9 MR. SCHROCK: I know, Your Honor.

10 THE COURT: I'm going to rule one way or the
11 other, and then if people are unhappy, then that's what, you
12 know, that's what the appellate process is for, okay?

13 MR. SCHROCK: You got it, Your Honor.

14 THE COURT: Okay, 9:00 o'clock tomorrow for
15 everybody?

16 (No audible response.)

17 THE COURT: All right. As always, you can leave
18 all your things in there. Although I would ask -- the water
19 bottles are starting to multiply.

20 (Laughter)

21 THE COURT: I mean, again, they'll come in and
22 empty the trash cans.

23 MR. SCHROCK: We'll clean up, we'll clean up.

24 THE COURT: Well, you don't have to clean up.
25 They just won't take things off the table because I've told

1 them, "Don't touch the lawyers' stuff," and evidently, that
2 includes ownership of water bottles. So, if you could just
3 throw them in a garbage can, that'd be great.

4 With that, everybody, have a good evening.

5 We'll be adjourned.

6 THE CLERK: All rise.

7 (Proceedings adjourned at 5:52 p.m.)

8 * * * * *

9 I certify that the foregoing is a correct
10 transcript to the best of my ability due to the condition of
11 the electronic sound recording of the ZOOM/video/telephonic
12 proceedings in the above-entitled matter.

13 /S/ MARY D. HENRY

14 CERTIFIED BY THE AMERICAN ASSOCIATION OF

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16 JUDICIAL TRANSCRIBERS OF TEXAS, LLC

17 JTT TRANSCRIPT #67231

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